137-147

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1119. 761

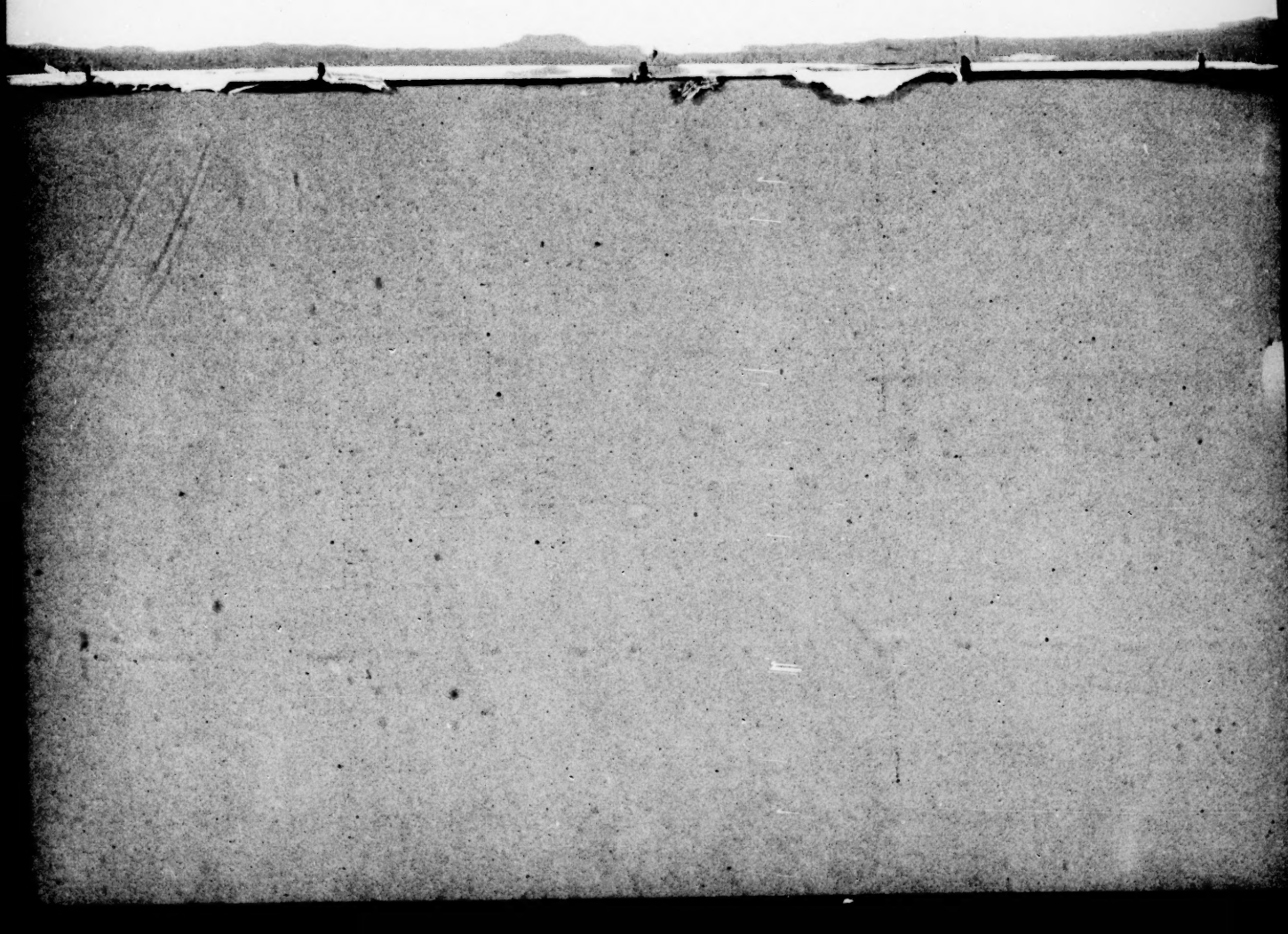
THE UNITED STATES, APPELLANT,

vs.

JOHN GRIMLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 27, 1889.



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1 UNITED STATES OF AMERICA,
Massachusetts district, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston within and for the district of Massachusetts, on Monday, the 15th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

Before the Honorable LeBaron B. Colt, circuit judge.

No. 3174 Law-Docket.—John Grimley, petitioner for habeas corpus.—Appeal by the United States et al. from the decree of the district court discharging the petitioner.

This appeal is entered in this circuit court at the present October term, A. D. 1888, and the transcript of the record of the district court is filed, which transcript is as follows:

TRANSCRIPT OF RECORD OF DISTRICT COURT.

[Filed October 15, 1888.]

UNITED STATES OF AMERICA,
Massachusetts district, ss:

At the district court of the United States, begun and holden at Boston, within and for the district of Massachusetts, on the fourth Tuesday (being the twenty-sixth day) of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Before the Honorable Thomas L. Nelson, judge.

2 *John Grimley, petitioner for writ of habeas corpus.*

This petition was filed in court on the 22d day of June, A. D. 1888, and is as follows, viz:

[District court of the United States, district of Massachusetts.—In re John Grimley.]

PETITION FOR HABEAS CORPUS.

To the honorable the justice of the district court of the United States for the district of Massachusetts:

1. Respectfully represents unto your honor John Grimley, of Boston, in said district.

2. That at said Boston, on the sixteenth day of May, 1888, he was arrested on the charge of being a deserter from the Army of the United States, aforesaid.

3. That your petitioner never was enlisted in the military service of the United States so as to be liable for desertion.

4. That the enlistment, if any such is set up, is illegal and void, because your petitioner was over thirty-five years of age at the time of the pretended enlistment.

5. That your petitioner is now wrongfully and illegally restrained of his liberty on the aforesaid charge of desertion.

6. That your petitioner is not guilty of the offence of desertion aforesaid.

7. That Joseph B. Campbell, of the 4th U. S. artillery, commanding at Fort Warren, in said district of Massachusetts, where your petitioner is now detained, is the person restraining your petitioner.

3 8. Wherefore your petitioner prays that a writ of habeas corpus may issue, and for such other relief as to your honor may seem meet, to the end that your petitioner may obtain his liberty.

JOHN GRIMLEY.

UNITED STATES OF AMERICA,
District of Massachusetts:

FORT WARREN, *Boston, June 20,* 1888.

Then personally appeared John Grimley and made oath that the statements contained in the foregoing application by him signed are true to the best of his knowledge and belief.

Before me,

WM. H. BROWN,
Justice of the Peace.

WRIT OF HABEAS CORPUS.

Thereupon, on said 22d day of June, A. D. 1888, by order of the judge, a writ of habeas corpus issued to the said Joseph B. Campbell, commanding at Fort Warren, in the district of Massachusetts, commanding him to take and have the body of the said John Grimley, by him restrained of his liberty (as it is said), before the judge of the district court of the United States at the United States court-house in Boston, in said district, on Monday, the 25th day of June current, at ten o'clock a. m., to do and receive what the said court shall consider then and there concerning him in this behalf, and then and there to show cause (if any he had) of the taking and detaining of the said John Grimley; and to have there this writ with his doings therein.

4 And the following is the return therein, viz:

FORT WARREN, MASS., *June 25th,* 1888.

To the Hon. THOMAS L. NELSON,
Judge of U. S. District Court, District of Massachusetts:

Private John Grimley, general muster service U. S. Army, is held as a prisoner by me at this place by virtue of a commitment contained in General Court-Martial Orders, No. 46, dated H'dq'rs, Division of the Atlantic, Governor's Island, N. Y. City, June 6th, 1888, a copy of which is herein inclosed. He was duly tried by a general court-martial, convened at this place by Special Order No. 101, current series, of the Division of the Atlantic, for the crime of desertion. The court was of competent jurisdiction. The man plead and tried to establish that he had not been properly enlisted into the service of the United States. The court found him guilty of the offence charged, and sentenced him to be confined at hard labor for six months, forfeiting ten dollars per month of his pay and half of his clothing allowance for the same period.

I have requested Capt. James Miller, 2d Infantry, the officer who enlisted Grimley, to appear before you to testify in the case if you desire. The question of his guilt or innocence has been established by the court designated by law to try such cases, and I request that the prisoner be remanded to my custody.

J. B. CAMPBELL,
Capt. 4th Art'y, C'g Post.

This petition was entered at the March term of this court, A. D. 1888. And on the 25th day of June, A. D. 1888, it appearing to the court
5 that the petitioner is illegally restrained of his liberty, it is ordered, that the said John Grimley be discharged from custody.

From said March term, A. D. 1888, this petition was continued to the present term. And on the 30th day of June, A. D. 1888, the following appeal by the United States is filed in court, viz:

[In re John Grimley, petitioner for habeas corpus.]

And now comes Owen A. Galvin, and on behalf of Joseph Campbell and James Miller, and as United States attorney acting in behalf of the United States, claims and appeal from the decision of this honorable court.

OWEN A. GALVIN.

And thereupon said appeal is allowed by the court.

I, Elisha Bassett, clerk of said court, hereby certify that the foregoing is a true copy of the record of said court.

In witness whereof I have hereto subscribed my name and affixed the seal of said court this seventeenth day of September, 1888.

[SEAL.] ELISHA BASSETT,
Clerk.

Upon the entry of this cause in this circuit court, the respondents, appellants, the United States J. B. Campbell, captain 4th Artillery, commanding the military post, Fort Warren, and James Miller, captain 2d Infantry, appear by Owen A. Galvin, attorney of the United
6 States for this district, and the petitioner, appellee, appears in person, and by Henry W. Putnam, esquire, his attorney, and this cause is thereupon set down for hearing and fully heard by the court on the twenty-second day of January, A. D. 1889. On the twenty-seventh day of February, A. D. 1889, the opinion of the court is announced and the following decree is entered:

DECREE OF CIRCUIT COURT.

[February 27, 1889.]

This cause came on to be heard at this present term, and now, to wit, February 27, 1889, it is ordered and decreed that the decree of the district court herein, discharging the petitioner, be affirmed and the United States, by their attorney, claiming an appeal to the Supreme Court of the United States, the same is allowed; and it is further ordered and decreed that the said John Grimley, petitioner, be allowed to March 15, 1889, to file a bond in this cause in the sum of five hundred dollars, with sufficient surety or sureties to be approved by the clerk of this court, conditioned

that the said John Grimley shall appear in this court at the term on which the mandate of the Supreme Court, issued upon the hearing of said appeal in said Supreme Court, shall be received and filed in this circuit court, and that the said John Grimley shall do and receive that which by this court shall be then and there enjoined upon him and not depart without license; and it is further ordered that if the said John Grimley shall fail to file the aforesaid bond on or before said March 15, 1889, the said John Grimley shall appear before this court on March 16, 1889,
7 at 11 o'clock a. m., to do and receive what shall then and there be enjoined upon him.

By the court:

JOHN G. STETSON,
Clerk.

On the sixth day of March, A. D. 1889, the following bond is filed:

BOND FOR APPEARANCE OF PETITIONER, ETC.

[Filed March 6, 1889.]

Know all men by these presents, that we, John Grimley, of Boston, in the State of Massachusetts, as principal, and William F. Day, of said Boston, as surety, are held and firmly bound unto the United States of America, in the full and just sum of five hundred dollars, to be paid to the said United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, dated the sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a cause entitled John Grimley, petitioner for writ of habeas corpus, in which a decree was entered by said circuit court affirming the decree of the district court of the United States for this district discharging the said Grimley from the custody of the military authorities of the United States, and the said United States having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid cause,

Now, the condition of the above obligation is such that if the said John Grimley shall appear in the circuit court at the term in which the
8 mandate of the Supreme Court of the United States, issued upon the hearing of said appeal, shall be received and filed in this circuit court, and shall do and receive that which shall then and there be enjoined upon him, and not depart without license, then this obligation to be null and void, otherwise to remain in full force and virtue.

JOHN GRIMLEY. [L. S.]
WM. F. DAY. [L. S.]

Signed, sealed, and delivered in presence of—
H. W. PUTNAM, to J. G.
JOHN G. STETSON, to W. F. D.

Surety approved by me.

JOHN G. STETSON,
Clerk.

At the hearing of this cause before this circuit court oral and documentary evidence was introduced and, the same not appearing of record, the following agreement of parties is filed:

AGREEMENT OF PARTIES.

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts.

In the matter of John Grimley, petitioner for habeas corpus.

It is hereby agreed that it was found as a fact by the court that the petitioner John Grimley was, at the time of his alleged enlistment on February 18, 1888, over forty years of age and that said finding of fact is hereby made a part of the record.

It is also agreed that the following papers were in evidence before the court and are hereby made a part of the record:

1. The record of the trial and sentence of the petitioner by court-martial, marked "Exhibit A."

2. The petitioner's enlistment paper, marked "Exhibit B."

9 3. The record of the petitioner's physical examination by the officer in charge of the recruiting rendezvous, marked "Exhibit C."

4. The slip for examining surgeon, marked "Exhibit D."

HENRY W. PUTNAM,
of Counsel for Petitioner.
THOMAS H. TALBOT,
Counsel for Respondents.

EXHIBIT A.

UNITED STATES OF AMERICA.

[Cut.]

WAR DEPARTMENT,
Washington City, September 13, 1888.

Pursuant to section 882 of the Revised Statutes, I hereby certify that it appears from the records of the Judge-Advocate-General's Office that the annexed is a true copy of the record of the trial of Private John Grimley, general mounted service, U. S. Army, by a general court-martial convened at Fort Warren, Massachusetts, May 24, 1888.

G. NORMAN LIEBER,
Acting Judge-Advocate-General.

Be it known that G. Norman Lieber, who signed the foregoing certificate, is the Acting Judge-Advocate-General of the Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof, I have hereunto set my hand, and caused
10 the seal of the War Department to be affixed, on this 19th day of Sept'r, one thousand eight hundred and eighty-eight.

R. MACFEELY,
[SEAL.] *Act'g Secretary of War.*

Proceedings of a general court-martial convened by virtue of the following order:

[Extract.]

SPECIAL ORDERS }
No. 101. }

HEADQUARTERS DIVISION OF THE ATLANTIC,
Governor's Island, New York City, May 21, 1888.

* * * * * * *

3. A general court-martial is appointed to meet at Fort Warren, Mass., on Thursday, the 24th day of May, 1888, at 10 o'clock a. m., or as soon thereafter as practicable, for the trial of such prisoners as may be brought before it by authority from these headquarters.

Detail for the court.

1. Major George W. Baird, pay department.
2. Captain Joseph B. Campbell, 4th Artillery.
3. Captain William C. Shannon, Assistant Surgeon.
4. Captain George G. Greenough, 4th Artillery.
5. 1st Lieutenant William F. Stewart, 4th Artillery.

2nd Lieut. George F. Landers, 4th Artillery, judge-advocate.

A greater number of officers than those named can not be assembled without manifest injury to the service.

* * * * * * *

By command of Major-General Schofield:

WILLIAM D. WHIPPLE,
Assistant Adjutant-General.

Official:

H. S. WHIPPLE,
2nd Lieutenant, 10th Cavalry.

11 FORT WARREN, MASS., *May* 24, 1888.

The court met pursuant to the foregoing order at 10.10 o'clock a. m.

Present:

1. Major George W. Baird, pay department.
2. Captain Joseph B. Campbell, 4th Artillery.
3. Captain William C. Shannon, Assistant Surgeon.
4. Captain George G. Greenough, 4th Artillery.
5. 1st Lieutenant William F. Stewart, 4th Artillery.

2nd Lieutenant George F. Landers, 4th Artillery, judge-advocate.

The court then proceeded to the trial of Recruit John Grimley, G. M. S., U. S. A., who was brought before the court and, having heard the order appointing it read, was asked if he objected to being tried by any officers detailed in the order convening the court, to which he replied in the negative.

The members of the court were then severally duly sworn by the judge-advocate, and the judge-advocate was then duly sworn by the president of the court; all of which oaths were administered in the presence of the accused.

The accused, Recruit John Grimley, G. M. S., U. S. A., was then duly arraigned upon the following charge and specification:

Charge: Desertion.

Specification: In this, that Private John Grimley, a soldier in the service of the United States, and a recruit of the general mounted service, U. S. A., did desert the said service at Boston, Mass., on the day of his enlistment, 18th day of February, 1888, and did remain absent in desertion until apprehended at Boston, Mass., on the 16th day of May, 1888.

To which the accused pleaded as follows:

12 To the specification: Not guilty.

To the charge: Not guilty.

Captain JAMES MILLER of the 2nd U. S. Infantry, recruiting officer Boston, Mass., a witness for the prosecution, was then duly sworn by the judge-advocate and testified as follows:

Question by J. A. Do you recognize the accused? If so, who is he?

Answer. John Grimley, recruit, general mounted service, U. S. A.

Question by J. A. When and where did you first see the accused?

Answer. At the recruiting rendezvous, Boston, on the 18th Feb., 1888, when I enlisted him in the general mounted service.

Question by J. A. State what you know of the accused from the time of his enlistment until he was arrested and sent to Fort Warren as a prisoner for desertion.

Answer. The accused had permission to leave the rendezvous for a short time on the same day that he enlisted; he went off and never came back again. About the middle of April I set a detective on his track, and on the 16th of May, or about that date, the detective arrested him and brought him to the rendezvous, from whence he was sent to this post for safe keeping.

Question by J. A. Did the accused assign any reason for wishing to leave the rendezvous, and was he to return to the rendezvous before any specified hour?

Answer. He did not assign any reason to me that I recollect of.

13 I can not state positively in regard to the hour, although it is my impression that there was an hour set for his return. Permission was given him through the sergeant of the detachment.

Question by J. A. Did you receive any word, verbal or written, with regard to the accused, from the time he left the rendezvous until he was arrested?

Answer. Nothing except the information received from the detective, from time to time, as to his probable whereabouts and the time and place where he expected to capture him. I saw a letter from a person who informed the detective of Grimley's return to the city, and that he would probably be at a particular place on a particular day.

Cross-examination:

Question by accused. Do you know that I left the city?

Answer. I do not know it; my answer was, I had received information that you had left the city.

Question by court. Was uniform clothing issued to the prisoner, and how was he dressed when he left the rendezvous?

Answer. Uniform clothing was issued to him. I do not know how he was dressed when he left the rendezvous.

Question by court. How much clothing was issued; give articles or money value?

Answer. It was either $24 or $25 and 12 cents. The articles issued were one cap, one blouse, blue flannel shirt, undershirt, drawers,
14 stockings, woolen blanket, and overcoat, as nearly correct as I can say from memory.

Question by court. What became of the articles of clothing?

Answer. I do not know.

Question by court. Were the man's citizen's clothes taken from him?

Answer. I could not say, but most likely not. The men are always allowed to retain their citizens' clothing until they can dispose of it, and as he left so soon, it is likely that the clothing was still in his possession or under his control.

Question by court. What persons are usually present at issues of clothing to recruits at your rendezvous, and were you present also?

Answer. I was not present when this issue was made. I saw the accused in uniform and therefore I know the issue had been made to him. My verification of the issue is made by enumerating myself to each man the articles charged to him, and requesting him to say whether he had received these articles or not. This man left so soon that I had no opportunity of doing that, but I saw his signature to the clothing rolls where he acknowledged the receipt of the articles and value testified thereto, and two acting non-commissioned officers testified to his having received these articles.

Question by court. Did the information come to you from the detective directly or through a non-commissioned officer of the detachment?
15 Answer. From the detective directly.

Question by court. Will you inform the court what means you took to inform yourself as to the mental qualities and the condition of the accused before enlisting him?

Answer. I put the accused through quite a long and close verbal examination. There was a particular reason for doing so in his case. A man apparently intelligent, well mannered, and with an ostensibly good means of getting a livelihood, in the neighborhood of thirty years old, in the great majority of cases is driven to enlist by drink. I had satisfied myself that the man was not then under the influence of liquor, and that he was not suffering, so far as an average observer could determine, from the effects of a recent spree; and it therefore became necessary, in my mind, to see what I could find out by questioning him, to see if he could account in any other way for his desire to enlist. He gave a full and apparently frank account of his life for some time previously, and in what manner circumstances beyond his control had placed him in a position where enlistment was about the best thing he could do. There was nothing whatever in the matter or manner of his answer to lead to the slightest suspicion that his faculties were at all disturbed, and his natural intelligence is certainly above the average.

Question by court. What information in regard to the duties and obligations of a recruit to the Government, and the officers representing it, had been imparted to this man previous to his leaving the rendezvous?

16 Answer. I can not positively state in regard to that. When I first took charge of the rendezvous I was not aware that the recruiting regulations required certain of the articles of war to be read to the recruits before they were sworn in. I was led after while to adopt the practice of explaining to them what desertion was, and of reading the 47th article of war to them, by my own ideas of the necessity of the case. I afterwards discovered it was prescribed by regulations, but as there was a time when this information was not given, I can not say positively that this was done in the case of the accused, although my impression is that it was. I took charge of the rendezvous in October, '87, and it is my impression that I adopted the rule of which I have spoken not more than two months thereafter.

Question by court. What was customary as to time of absence of recruits from the rendezvous on your permission, and did the accused have a written pass?

Answer. The accused did not have a written pass. It is customary to give them almost any leave they request which will not include the time of departure of a detachment. That would probably be at the time the accused enlisted, not more than two days; it might be but a few hours.

Cross-examination:

Question by accused. Where did you see me with a uniform on?

Answer. At the rendezvous.

Question by accused. What part of the building?

17 Answer. In the front room; as I recollect I saw you coming in the room, and as I thought from upstairs, a short time after you had been sworn in.

Question by accused. Did you see me out of the clothing room in uniform?

Answer. Yes.

Question by court. Do you know whether the prisoner left behind him any of the clothing issued to him?

Answer. I do not know.

Question by court. Did you verify the issue to this man, or see his signature to the clothing rolls before he was supposed to be a deserter?

Answer. As already explained, I did not verify the issue. I could not say positively that I saw his signature before he was considered a deserter. I had the means of comparing his signature on the clothing rolls with an undoubted signature.

The prisoner declined to further cross-examine the witness.

Lance Sergeant CHARLES CONAHAN, general recruiting service, Boston, Mass., a witness for the prosecution, was then duly sworn by the judge-advocate and testified as follows:

Question by J. A. When and where did you first see the accused?

Answer. On the 18th Feb., 1888, at the recruiting rendezvous.

18 Question by J. A. How did the accused come under your authority?

Answer. He enlisted, and when sworn in I took charge of him.

Question by J. A. What did you first do with him?

Answer. I took him up-stairs to issue his uniform.

Question by J. A. Did the accused receive this uniform in his possession, or did he merely sign the clothing rolls?

Answer. He signed the clothing rolls. I took the clothes off the shelf and laid them on the floor in a little room without the clothes room, which is used as a room for recruits to change their clothing.

Question by J. A. What clothing did the prisoner receive, and did he verify the clothing?

Answer. I placed out in the room cap, blanket, trousers, blue shirt, and I think a pair of cotton stockings. I do not know if he took this clothing out of the room or not

Question by J. A. Did you see the prisoner enter this little dressing room?

Answer. No, sir; I did not.

Question by J. A. Did you see the prisoner after he signed the clothing rolls; and, if so, when and where?

Answer. He signed the clothing rolls down in the office. I saw him up in the clothing room when the clothing was issued. I did not see him after that.

19 Question by J. A. Did you see the prisoner in uniform?

Answer. No, sir.

Question by J. A. After the clothing was laid out in the clothing room what was done with it?

Answer. It laid there and he afterwards asked permission to go away to see his mother; he went away in citizens' clothes.

Question by J. A. How do you know he went away in citizens' clothes?

Answer. I saw him go down-stairs in citizens' clothing. The clothing room is on the third floor, and he went down one flight of stairs.

Question by J. A. Did the prisoner have your permission to go away? If so, where, and when was he to return?

Answer. He had my permission to go away; I do not remember when he was to return. He said he wished to go to see his mother or his sister; I do not remember which he said.

Question by J. A. How long do you allow recruits to be absent usually?

Answer. We send them to the depot usually three times a week if we have six men, and we usually give them permission to be absent until the day they go away.

Question by J. A. Did you receive any word from the accused, or from the friends of the accused after he left the rendevous?

Answer. No, sir.

20 Question by J. A. Was the clothing roll taken to the clothing room?

Answer. No, sir; I have a book I take to the clothing room, when I issue to the recruits, in which I enter the clothing I issue, and then afterwards enter this clothing on the rolls.

Question by J. A. Was the attention of the recruit in any way called to the articles of clothing for which he had signed?

Answer. No, sir.

Question by J. A. Was any one present when this clothing was issued besides you and the accused?

Answer. I think Corp. McIntyre was.

The accused declined to cross-examine the witness.

Question by court. Was the accused in the room upon the floor of which you say you placed this clothing when you placed it there, and did you give him any information as to what it was for or what he was to do with it, or did anybody else give such information?

Answer. I do not think he was; he was in the clothing room with me. No, I gave him no information as to what he was to do with it or what it was for, and I do not think anybody else gave him such information.

Question by court. What did you do with the clothing placed on the floor that the accused did not take possession of, and what became of it?

21 Answer. I may have placed it back in the clothing room; I do not remember. Sometimes we have a great many recruits, and I do not watch what they do with it. I have a great many papers to make out and can not watch what they do with it. There is an orderly there who takes charge of the recruits after they have enlisted, and takes them down in the dormitory.

Question by court. Who has direct custody of the stock of clothing at the rendezvous?

Answer. I have the key of the clothing room; I issue all the clothing.

Question by court. Who was in the dressing room when clothing was put there for the prisoner?

Answer. I am not certain. I think Corp. McIntyre was in the clothing room when I issued the clothing; I am not certain whether he was in the dressing room.

Question by court. Did the prisoner take any article of uniform clothing with him when he went down-stairs from third floor to second floor?

Answer. Not that I saw.

Question by court. So far as you know, did the prisoner take into his hands or possession any article of uniform clothing laid out for him in the dressing room?

Answer. No, sir.

Question by court. Did you tell the man how long he could be gone or when he must return?

22 Answer. I do not remember whether I told him to return at a certain time or not. If I am not mistaken I think he said he would be back in two or three hours. I am not certain; I am under the impression that is what he said.

Question by court. Were any efforts made by you to find the accused or tell him he was wanted at the rendezvous?

Answer. No, sir.

Question by court. Was any instruction given the prisoner as to his duties as a soldier, and were any of the articles of war read to him from the time he applied for enlistment up to the time of his going away?

Answer. Capt. Miller reads the article of war about deserters before he swears them in. I am not positive that it was done so in this case.

Question by court. Do recruits always sign the clothing rolls before going upstairs to receive clothing?

Answer. Yes, sir.

Question by court. What is the position of the dressing room with respect to the clothing room?

Answer. On the same floor next to the clothing room, and to reach it you go into the hall and step into the dressing room.

(The plan of the dressing and clothing room, as made by the witness, appended and marked "A.")

Question by court. How many men or applicants for enlist-
23 ment do you handle per day.

Answer. Some days we have fifteen or twenty applicants and sometimes we accept six or eight. On an average we accept about three.

The prisoner declined to cross-examine the witness.

THOMAS MCINTYRE, lance corporal, general service, Boston, Mass., a witness for the prosecution, was then duly sworn by the judge-advocate, and testified as follows:

Question by J. A. Do you recognize the accused? If so, who is he?

Answer. John Grimley, recruit G. M. S., U. S. A.

Question by J. A. When and where did you first see the accused?

Answer. 18th Feb. last, 1888, at the recruiting rendezvous, Boston, Mass., where he applied for enlistment into the cavalry.

Question by J. A. Were you present in the clothing room when clothing was issued the accused?

Answer. Yes, sir.

Question by J. A. How was the clothing issued?

Answer. The sergeant, I believe, brought the clothing from the clothing room into the dressing room. I made a note of the clothing that was issued and then went to the office with the report.

Question by J. A. What was done with the clothing after being
24 placed in this little dressing room?

Answer. I do not know; I considered the clothing was issued and went to put it on the rolls.

Question by J. A. Where was the prisoner during this time?

Answer. He was present, I think, in the dressing room.

Question by J. A. Did you see the prisoner after you went down stairs?

Answer. No, sir.

Question by J. A. Did the prisoner receive this clothing in his possession?

Answer. It was laid there before him; I did not see him pick it up.

Question by J. A. Do you know if the prisoner had permission to leave the rendezvous, and how was he dressed?

Answer. I don't know, only what the sergeant said afterwards. I asked him about 1 o'clock where Grimley was, and he told me he supposed he had gone to visit some relatives, either his mother or sister, I do not remember which.

Question by J. A. Did you see any of the clothing issued to recruit Grimley after he left the rendezvous?

Answer. No, sir.

Question by J. A. Did you hear from the prisoner directly or indirectly from the time he left the rendezvous until he was arrested?

25 Answer. No, sir.

Cross-examination:

Question by accused. Who showed me into the dressing room?

Answer. You were upstairs when I came upstairs; I am not sure whether you were in the dressing room at that time or not.

Question by court. Was the accused told by you, or to your personal knowledge by anybody else, anything in regard to this clothing "issued" to the prisoner?

Answer. Not that I remember.

Question by court. Do you know of your own knowledge whether the prisoner received permission to leave the rendezvous; if he did, for how long a time?

Answer. I do not know.

Question by court. Did you at any time ever see any of this clothing in the possession of the prisoner?

Answer. No, sir.

Question. Was Grimley's name placed on the parcel of clothing, or was Grimley given to understand what parcel was his?

Answer. I don't remember if the words were used in that way, but I supposed that he understood which was his.

Question by court. What reason had you to suppose a new recruit knew anything about clothing or anything else connected with the army?

26 Answer. I supposed that he knew he would have to wear a uniform, and seeing this put before him would understand it was for him.

Cross-examination:

Question by accused. In what place was the clothing put before me?

Answer. In the room known as the dressing room.

Question by accused. What did I do in the dressing room?

Answer. I don't know that you did anything but stand there.

Question by accused. Did you see me in the dressing room?

Answer. I think I did; I am not sure.

The judge-advocate announced that the prosecution here rested.

Mrs. MARGARET GRIMLEY, 31 Genesee st., Boston, Mass., mother of the accused, and a witness for the defense, was then duly sworn by the judge-advocate, and testified as follows:

Question by accused. When I came home from the recruting office, what did I tell you?

Answer. You told me that night that you was enlisted, and I thought it could not be, and I went there in the morning to see, and I saw three gentlemen there, and I asked if it was true; they told me, "it was all right with him," to "let him go to his work;" so I came home and told you and you went to work.

27 Question by accused. Did I request you to allow me to go to Portland st. and try to arrange it with the officers there, as I did not consider myself legally enlisted?

Answer. Yes.

Question by accused. Did you say, "No; I will go myself and see the officers?"

Answer. Yes; I would not let you go at all.

Question by accused. Do you not think what you said to me is the cause of my not going back to Portland st.?

Answer. Yes; I would not let you go until I first went myself.

Cross-examination:

Question by J. A. How was the accused dressed when he arrived at your house?

Answer. He had his best suit on; his own clothes.

Question by J. A. What were the words, as near as you can remember, used by the three men at the rendezvous when talking to you?

Answer. They said to me, after I told them who I was, "It was all right; that I might go home contented and let him go to his work."

Question by J. A. Who were those three men, and have you seen them since?

Answer. I have not seen them since; they were dressed in officers' clothes; I never saw them before.

28 Question by J. A. What did they mean when they said it was "all right?"

Answer. They said they guessed there was no such thing that he was enlisted. They said it was all right; to go home and send him to work.

Question by J. A. Describe the clothing worn by the three men you saw?

Answer. Like what I see here, but they had nothing on their shoulders.

Question by the court. Did the gentlemen you saw have a white stripe on their pantaloons?

Answer. Yes, they had stripes, and I think they were white.

Question by court. At what place was it that you saw the three gentlemen you speak of?

Answer. At the place where the desk are; two were writing at them and the other was sitting on a chair. It was on Portland st.

Question by court. Have you seen any of them to-day?

Answer. No, sir.

Question by court. Did you see the soldiers who came down on the boat this morning?

Answer. Yes, sir.

The accused declined to cross-examine the witness.

29 The accused, JOHN GRIMLEY, wished to be sworn as a witness in his own defense, and having been duly sworn by the judge-advocate testified as follows:

Question by accused. State all you know about your enlistment.

Answer. I had been unsuccessful in business; could not obtain a situation as riding master and got a little low spirited, and having lived with an English general, and liking the army, I thought I would go into Portland st. and see what arrangements I could make about going into the cavalry. The corporal or sergeant spoke to me; asked me if I wanted to enlist. I said yes, and he put me through two or three forms, which I did not thoroughly understand, but took as a matter of course; and the sergeant took me up in the clothing room, took a cap, put it on my head, took it off again, put something on the floor (I think it was a coat and cap), and at that stage I thought I better go home and see my mother before I went on further into it. I asked the sergeant's permission to go

and see my friends, and he said "Be back on Monday sometime"; I do not remember the hour. This was Saturday. I left the recruiting office directly, and went to see my mother. I told her I had gone through a form of enlistment, and she was in such a state of grief I thought she was going to die.

The court then, at 3 o'clock p. m., adjourned to meet on Monday, the 28th instant, at 12 m.

GEORGE F. LANDERS,
2nd Lt., 4th Art'y, Judge-Advocate.

30 *Second day.*

FORT WARREN, MASS., *May* 28, '88.

The court met pursuant to adjournment, at 12.20 o'clock p. m.

Present:

1. Major George W. Baird, pay department.
2. Captain Joseph B. Campbell, 4th Artillery.
3. Captain W. C. Shannon, Assistant Surgeon.
4. Captain George G. Greenough, 4th Artillery.
5. 1st Lt. William F. Stewart, 4th Artillery.

2nd Lieut. George F. Landers, 4th Artillery, judge-advocate.

The accused, recruit John Grimley, G. M. S., U. S. A., also present.

The proceedings of the 24th instant were then read and approved.

The accused then concluded his reply as follows:

To pacify her I told her I would go down to Portland st. and try and arrange it for giving the people there the trouble, as she felt so bad about it, but she insisted on going herself, and done so, came back and told me that it was not necessary for me to go to Portland street, as she had seen the people there and it would not be necessary for me to return. I had not got work at that time, but I can easily get work of some kind at any time. I took an inferior situation temporarily, and thought no more about the army. I did not think myself liable in any way to prosecution

Cross-examination:

Question by J. A. You say you went through a form of enlistment did you swear to serve the United States for any length of time?

Answer. Yes, sir; I think I did.

31 Question by J. A. How did you think your mother had relieved you of this duty?

Answer. I thought like this, when I came to consider it quietly, that she would be unprovided for if I went into the army; I fully intended going into the cavalry, had it not been for my mother.

Question by J. A. What did you think your mother did at the recruiting office?

Answer. I thought she went to the recruiting officer and explaining the circumstances and the recruiting officer would look at it in this way, as I had not finished, as I thought, the enlistment, that he would say it would not be necessary for him to come back, as I looked upon it as getting any other kind of a situation.

Question by J. A. What else did you think was to be done to complete your enlistment, and what did you understand had been done?

Answer. To have my uniform on and commence service, after being instructed by some one. I understand I had made a beginning for them to take me into the cavalry.

Question by J. A. What did you think your oath meant?

Answer. At the time I could not say, but now I know the meaning after I have been instructed. It means now, that if I took an oath to perform any duty, I would think it necessary to perform it.

Question by J. A. Did you ever think of returning to the recruiting office to speak to them about your having been there?

32 Answer. Yes, sir; when I left the recruiting office I left with the intention of returning. A month afterwards, while passing Portland st., I thought of going up and speaking to the soldiers in a friendly way, having been there before, and of explaining why I had not returned if they asked me the question; and also of passing the time of day with them.

Question by J. A. How and where were you instructed as to the meaning of an oath?

Answer. I don't remember of ever having been instructed, as I was never before in court or never took an oath that I can remember.

Question by J. A. What is an oath?

Answer. An oath is making a promise to perform a certain thing and keeping that promise. There is no difference between a promise and an oath that I know of.

Question by court. Were you told when you went from the recruiting rendezvous that you must be back at any specified time, or did you ask for any specified time of absence?

Answer. I think the sergeant told me to be back on Monday; this was Saturday.

Question by court. Why didn't you go to see the soldiers, as you say you thought of doing on one occasion?

Answer. I was riding a very valuable horse, and was afraid to leave him in the street with any one.

Question by court. Whom did you see when you went to the recruiting office, and what did Captain Miller say to you?

33 Answer. I saw the corporal (McIntyre), the recruiting officer (Capt. Miller), and the sergeant; I don't know his name. Capt. Miller asked me a lot of questions how I had been employed lately.

Question by court. How long a time did Capt. Miller talk with you, and did he ask you any other questions, or give you any instructions?

Answer. I think it took Capt. Miller to examine me and all about one-quarter of an hour, as near as I can recollect. The only instructions he gave me were those he gave the corporal while he was examining me. I heard them. Capt. Miller read something to me out of a book, but I do not remember the nature of it.

Question by court. Did you know, then, the nature of what Captain Miller was reading?

Answer. I can not say I did, thoroughly. I looked at it as something that had to be read to me, and I took it as a matter of course.

Question by court. Were the words read to you intelligent? Did they convey any idea to you; if so, what idea?

Answer. They were intelligent; they read like any one reading a book

who can read well; they conveyed an idea of my enlistment, one of the articles necessary to enlist me.

Question by court. Did you make any reply or motion indicating that you understood?

Answer. No, sir, that I can remember. I did not repeat the words over after the officer; I might have said yes or no.

34 Question by court. What forms did you go through with at the recruiting office?

Answer. First I think was, the corporal asked me if I was going to enlist. I said yes. He measured me and examined me (took my clothes off), and the corporal and the officer then looked at me, and then Capt. Miller read something to me from a book. I was not asked to say anything, and after that the sergeant took me up stairs and took a cap and tied it on my head.

Question by court. You have testified to taking an oath; what did you swear to, and did you sign your name to the paper?

Answer. I signed my name in a book, but I can not remember what I swore to.

Question by court. Do you remember whether you signed one or more papers in presence of Capt. Miller before you signed the book?

Answer. I think Capt. Miller was not present when I signed the papers.

Question by court. You testified that you did not fully understand the forms; why did you not understand them?

Answer. I mean now I did not understand them; probably I did then to a certain extent.

Question by court. If you thought your enlistment was not finished, why did you ask permission of the sergeant to go home to see your mother?

Answer. I thought I would not get leave after I was enlisted. I
35 thought like this: As I had went through the form, it would be necessary to ask them. I did not consider myself entirely free when I asked the sergeant's permission.

Question by court. Were any articles of uniform clothing given or offered you? Did you take them?

Answer. No, sir.

Question by court. Why did you not take them?

Answer. I thought by taking them it would tie me up so that I could not go home. I asked the sergeant more out of politeness than anything. I did not think he could prevent me. I asked leave from the sergeant when he went to look over jackets, caps, and other clothing.

Question by court. Were you aware that you signed papers acknowledging to have received certain articles of clothing?

Answer. No, sir.

Question by court. You have sworn before this court to tell the truth, the whole truth, and nothing but the truth; what do you understand by that?

Answer. I understand, sir, now as I have some instructions, that I am compelled by this oath to tell the truth so far as I can remember.

Question by court. When you said you think, but are not sure, you

took an oath to serve the United States, what did you mean by that oath at that time?

Answer. Well, I should say, sir, that I did not take it at all
36 seriously or think it meant anything then, as I did not understand the nature of it, but now that I understand, it would mean something.

Question by court. When did you first become aware of the nature of an oath?

Answer. Within the last week; since I have been in this fort; in talking with men and they asking me about my case and learning something of the military rules and laws. Nothing more than I have picked up in conversation and listening to others.

The accused had no other witnesses to introduce, but submitted the letters appended and marked "B," which were read by the judge-advocate to the court.

The following statement was then made to the court by the accused:

"I am very sorry to have caused all this trouble to the military authorities."

The accused having no further testimony to offer or statement to make, the court was cleared and closed for deliberation, and having maturely considered the evidence adduced, finds the accused, private John Grimley, general mounted service, U. S. A.,

Of the specification: guilty;
Of the charge: guilty;

and the court does therefore sentence him, private John Grimley, general mounted service, U. S. A., to be confined at hard labor under the guard at such post as the commanding general may direct for six (6) months, forfeiting ten (10) dollars per month of his pay and one-half of his
37 clothing money for the same period. The court is thus lenient in view of the inexperience of the prisoner.

The court finds it incumbent upon itself to call attention of the reviewing authority to the facts developed in evidence in reference to the alleged issue of clothing to recruit John Grimley of the value of $25.12, which the evidence seems to indicate the accused did not receive.

The court then, at 2.50 o'clock p. m., adjourned to meet Friday, the 1st proximo, at 10 o'clock a. m.

GEORGE F. LANDERS,
2nd Lt. 4th Art'y, Judge-Advocate.

Third day.

FORT WARREN, MASS., *June* 1, '88.

The court met pursuant to adjournment at 10.15 o'clock a. m. Present:

1. Major George W. Baird, pay department.
2. Captain Joseph B. Campbell, 4th Artillery.
3. Captain William C. Shannon, Ass't Surgeon.
4. Captain G. G. Greenough, 4th Art'y.
5. 1st Lieut. Wm. F. Stewart, 4th Art'y.

2nd Lieut. George F. Landers, 4th Art'y, judge-advocate.

The accused, recruit John Grimley, G. M. S., U. S. A., also present.

The proceedings of the 28th ultimo were then read and approved.

There being no further business before it, the court then, at 10.45 a. m., adjourned *sine die*.

G. W. BAIRD,
Major Pay Department, President.

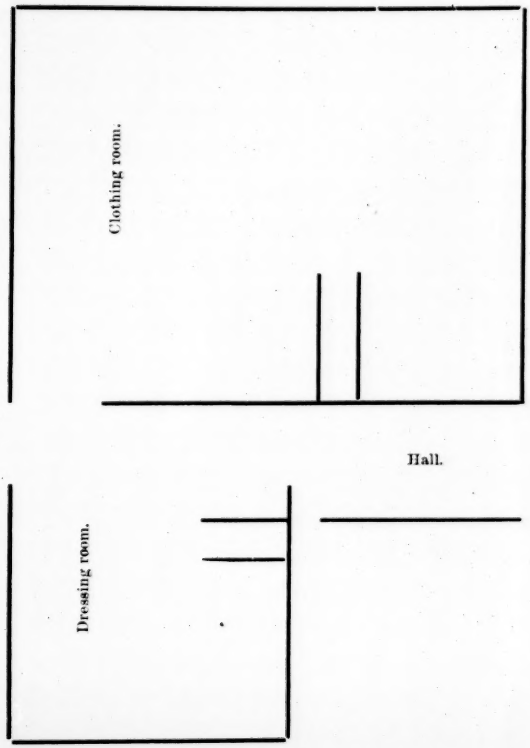
GEORGE F. LANDERS,
2nd Lt. 4th Art'y, Judge-Advocate.

38 HEADQ'RS DIVISION OF THE ATLANTIC,
Governor's Island, N. Y., June 6, 1888.

In the foregoing case of private John Grimley, general mounted service, the proceedings, findings, and sentence are approved and the sentence will be duly executed at Fort Warren, Mass.

J. M. SCHOFIELD,
Major-General, Com'g.

A.



39 "B."

90 EATON SQUARE, LONDON, *Sept. 20th*, 1883.

John Grimley lived in my service upward of eight years as second and head coachman. During that time I always found him sober, industrious, and trustworthy in every respect, and a remarkably good driver and rider.

H. A. HANKEY,
General, late First Dragoon Guards.

A true copy:
WM. F. STEWART,
1*st Lieut., 4th Art'y.*

[Wm. F. Day, Pres't, Fred'k Davis, Treas.]

SEWALL AND DAY CORDAGE COMPANY,
No. 83 and 85 Commercial St., Boston, May 24, 1888.

I write this to state that John Grimley has been in my employ for two or three months. He is a good driver and understands thoroughly the care of horses. My stable was kept with great care and neatness, and it was very evident to me that he was fully trained and capable. I always found him pleasant and respectful.

WM. F. DAY.

A true copy:
WM. F. STEWART,
1*st Lieut., 4th Art'y.*

40 EXHIBIT B.

Residence, Boston, Mass.

THE UNITED STATES OF AMERICA.

[Cut.]

STATE OF MASSACHUSETTS,
City or Town of Boston, ss:

I, John Grimley, born in Armagh, in the state of Ireland, aged twenty-eight years and months, and by occupation a groom, do hereby acknowledge to have voluntarily enlisted, this eighteenth day of February, 1888, as a soldier in the Army of the United States of America, for the period of five years, unless sooner discharged by proper authority; and do also agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war.

JOHN GRIMLEY. [SEAL.]

Subscribed and duly sworn to before me this 18th day of February, A. D. 1888.

JAMES MILLER,
Captain, 2d Infantry, Recruiting Officer.

I certify, on honor, that I have carefully examined the above-named man agreeably to the general regulations of the Army, and that,
41 in my opinion, he is free from all bodily defects and mental infirmity which would, in any way, disqualify him from performing the duties of a soldier.

JAMES MILLER,
Captain, 2d Infantry, Examining Officer.

I certify, on honor, that I have minutely inspected the above-named man, John Grimley, previous to his enlistment, and that he was sober when enlisted; that, to the best of my judgment and belief, he is of lawful age; and that I have accepted and enlisted him into the service of the United States under this contract of enlistment as duly qualified to perform the duties of an able-bodied soldier, and, in doing so, have strictly observed the regulations which govern the recruiting service. This soldier has blue eyes, d'k brown hair, ruddy complexion; is 5 feet 7 inches high.

JAMES MILLER, [SEAL.]
Captain, 2d Infantry, Recruiting Officer.

Written in the margin is the following:

NOTE.—Scars and marks found upon the person of a recruit will be here noted: Scar just over left eyebrow; one on right side forehead near hair.

Endorsed as follows:

Declaration of recruit.

I, John Grimley, desiring to enlist in the Army of the United States for the term of five years, do declare that I have neither wife nor child; that I am of the legal age to enlist, and believe myself to be physically qualified to perform the duties of an able-bodied soldier; and do further declare that I have never been discharged from the United States service (Army or Navy) or any other service on account of disability, or by sentence of either civil or military court, or in any case except with
42 good character, and for the reasons given by me to the recruiting officer prior to this enlistment.

Given at Boston, Mass., this 18 day of February, 1888.

JOHN GRIMLEY.

Witness:
CHARLES CONAHAN.

No.

John Grimley enlisted at Boston, Mass., on the 18th day of February, 1888, by Capt. James Miller, 2d Regiment of Infantry.

1st enlistment; last served in ——— ——— regiment of ———. Discharged ——— ——, 18—.

EXHIBIT C.

FORM FOR THE PHYSICAL EXAMINATION OF A RECRUIT.

Name, John Grimley; age, 28; occupation, groom; birth-place, Armagh, Irel'd; residence, Boston, Mass.; height, 5 f't 7 in.; weight, 132; chest measurement—expiration, 34½; inspiration, 37; nationality of father, Irish; of mother, Irish.

Have you applied for enlistment at any other rendezvous; and, if so, where? No.

What sickness have you had, and at what age? Never, that I remember.

Are both parents living? Father dead.

If either has died, state cause. Cause unknown.

If brother or sister has died, state cause. All alive.

Have you given up any occupation on account of your health or habits? No.

43 Are you subject to dizziness? No.

To severe headache? No.

To pain in the breast? No.

To fluttering of the heart? No.

To shortness of breath? No.

To colds in the head? No.

To coughs? No.

To diarrhœa? No.

To piles? No.

To rheumatism? No.

Do you believe you are sound and well now?

Have you had sore eyes? No.

Have you had running from either ear? No.

Have you had fits? If so, how frequently? No.

Do you have any difficulty in making or holding your water? No.

Have you had stricture? No.

Have you had gonorrhœa, and when? No.

Have you had a sore of any kind upon your penis, and when? No.

Have you had any swelling about or of your testicles? No.

Have you had a boil near the anus (fistula)? No.

Have you been ruptured? No.

Do you drink intoxicating liquors? If so, to what extent? Moderately.

Have you had the "horrors," and when? No.

Have you been hurt upon the head? Answer fully. No, except small cut on forehead.

Have you had a sprain? No.

A stiff joint? No.

A bone or joint out of place? No.

A bone broken? No.

Are you subject to sore feet? No.

Mention carefully any other injuries or any surgical operation you may have had in any part of your body, especially burns, cuts, severe bruises, &c.? No.

Is any one dependent on you for support? No.

Have you ever been convicted of a felony, or been imprisoned in a jail or penitentiary? No.

44 Written in the margin is the following:

Ask these questions before stripping. Answers indicating infirmities to be followed up in detail.

Endorsed as follows:

When stripped, examine carefully the head, ears, eyes (including color-blindness and astigmatism*); nose, mouth (especially teeth, hard palate, and tonsils); neck (especially for enlarged glands); chest:* shape* (flat or pigeon-breasted), resonance,* character of respiration;* heart:* sounds,* impulse* (position and force), action* (as to regularity); spine; abdomen (especially for hernia and enlarged glands in the groin); genito-urinary apparatus; anus (especially for fistula); upper extremities (especially for enlarged glands at the elbows); lower extremities; skin.

Toes crowded. Prominent veins on calf left leg.

One small old pile some fold skin.

Bunion left foot.

R taken for H and Z for W with left eye.

Knowledge of the English language; native.

Previous service (U. S. or foreign): None.

Comparative intelligence: Good.

Figure and general appearance: Spare and muscular.

Marks (Note 1): Scar just over left eyebrow. One on right side forehead near hair.

Written in the margin is the following:

Describe in detail any deviation from the normal in the regions enumerated.

I certify that I have asked the foregoing questions and have recorded the answers as given to me, and have personally examined the above-named recruit.

JAMES MILLER,
Capt. 2d Inf., Inspecting Officer.

Place: Boston, Mass.
Date: 18 Feb., 1888.

Especially for medical examiner.

Note 1. Record enough natural or artificial marks for identification, but do not encumber the form with trivial markings.

Note 2. This paper, with defects discovered at depot, noted and signed by the medical officer, to accompany the proceedings of board of inspection in the case of rejected recruits.

45 EXHIBIT D.

Res., Boston, Mass.

G. M. S. SLIP FOR EXAMINING SURGEON.

Name, John Grimley.
Where born, Armagh.
State or country, Ire.

Occupation, groom.
Age, 28.
Height, 5 feet 7 inches.
Weight, 132 pounds.
Measurement of chest at expiration, 34½ inches; at inspiration, 37 inches.
White.
Color of eyes, blue.
Color of hair, d'k brown.
Complexion, ruddy.

JAMES MILLER,
Capt. 2d Inf'ty, Recruiting Officer.

Accepted disposition and remarks.

Toes crowded. Prominent veins on calf left leg. One small old pile some folds skin. Bunion left foot. R taken for H & Z for W with left eye. Scar just over left eyebrow; one on right side forehead near hair.

JAMES MILLER,
Examining Surgeon.

Date, Feb. 18, 1888.

A true record.
Attest:
JOHN G. STETSON,
Clerk.

46 The following is the opinion of the circuit court in accordance with which the decree of the circuit court was entered February 27th, 1889, affirming the decree of the district court discharging the petitioner, etc.

CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts.

No. 3174 *Law Docket.—John Grimley, petitioner for habeas corpus.*

OPINION OF THE COURT.

[Filed March 12, 1889, as of Feb. 27, 1889.]

COLT, J. The case in re John Grimley arises on writ of habeas corpus, and comes here on an appeal from the district court. The first and most important issue in the case raises the question of the jurisdiction of the military tribunal who tried the petitioner.

Section 1116 of the Revised Statutes requires that men must be between the ages of 16 and 35 in order to be proper subjects of military service. It turns out in this case as a matter of fact that this petitioner was more that 40 years old at the time of his alleged enlistment. It is not claimed that he entered into any service or discharged any duties as a soldier. Whatever took place in the recruiting office at the time of his alleged enlistment, Grimley left the office or was permitted to depart, and was not

thereafter in the actual control of the military officers till his arrest on the charge of desertion. This is not the case of a person, who, after
47 some form of enlistment, has entered upon actual service in the Army and has departed therefrom. The jurisdiction of the military tribunal in this case depends upon the validity of the enlistment alone. Now, I can not but think that under these circumstances the fact that Grimley was over 40 years of age at the time of the alleged enlistment renders the enlistment void. The military tribunal could not acquire jurisdiction over the petitioner for the purpose of punishing him for desertion because he was not a proper subject for and had not entered upon actual military service. It is admitted by the counsel for the defendant that the civil courts have power to enquire into the jurisdiction of military tribunals, and that it is a proposition beyond dispute.

The position taken by the respondent here is that the military tribunal having found that the petitioner was in the military service of the United States, it is not open to this court to review that finding. It does not appear from the record that the military court entered specifically into the question of the age of the petitioner at the time of his enlistment. The court do not find as a fact that he was within the ages called for by the statute, but the district attorney says that this may be inferred from the fact that he was found by the military tribunal to be in the military service of the United States.

It is further argued that this finding can not be attacked in a collateral proceeding like the one before us, but that it can only be reviewed by the military tribunal itself, or by an appellate court, and that this court does not occupy the position of an appellate court. In considering the point now raised it must be borne in mind that we are dealing with a
48 question of jurisdiction. We are not denying the right of a military tribunal to punish a deserter or to exercise the rights and powers given to such tribunals under the statute. It is not a question of mere irregularity in the form or mode of proceeding, which might properly be cor'ected by the court which committed such error or by an appellate tribunal. But it is question which goes to the very foundation of the proceedings before the military tribunal, for if that tribunal did not have jurisdiction, then its acts are absolutely null and void, and they may be attacked in any collateral suit.

For example, the non-appointment in a civil suit of a guardian ad litem for an infant would be irregular, but the irregularity must be corrected by the court itself, or by an appellate court, the judgment or decree in the case would not be void and could not be attacked in a collateral suit. On the other hand if the minor had not been served with process so as to bring him within the jurisdiction of the court, the whole proceeding would be absolutely void and could be attacked in any collateral action. Where the court has no jurisdiction over the person or subject matter, its judgment is void everywhere. Where the judgment is only voidable from irregularity, you should go to the court itself where the action is pending, or to the appellate court to have the error corrected.

The general finding of the military court that the petitioner was in the military service of the United States, can be no bar to an inquiry into a jurisdictional fact. Otherwise the findings of military tribunals in respect

to all jurisdictional questions would be a bar to any proceedings on the part of the civil court. It seems to me that such a doctrine strikes
49 at the foundation of the right of the civil courts to inquire into the jurisdiction of military tribunals. It is saying in effect that all a military tribunal has to do to prevent any inquiry by a civil court is for itself to find that it had jurisdiction. I am clear in my mind that under this petition this court has a right to determine whether the military tribunal had any lawful jurisdiction over the petitioner at the time. Under the law regulating enlistments it seems to me that the petitioner was not a proper subject for military service, and therefore it follows that the military tribunal never acquired any jurisdiction over his person, and that its acts are void. The order of the district judge discharging the prisoner should be affirmed.

50 UNITED STATES OF AMERICA,
District of Massachusetts, ss.

I, John G. Stetson, clerk of the circuit court of the United States, within and for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled "No. 3174, law docket; John Grimley, petitioner for habeas corpus; appeal by the United States et al. from the decree of the district court discharging the petitioner," lately determined in said circuit court and of all proceedings therein including the opinion of the court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Boston, in said district, this twentieth day of March, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

[SEAL.] JOHN G. STETSON,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
JOHN GRIMLEY.
No. 761.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLANT.

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BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This was a petition for habeas corpus originally filed in the district court of the United States for the district of Massachusetts. The district court discharged the petitioner, and the United States appealed from that order to the circuit court. The appeal was heard by Judge Colt, and the order discharging the petitioner was affirmed. From this order of affirmation the present appeal is taken. In the petition for habeas corpus filed in the district court, the petitioner alleged that on the 16th day of May, 1888, he was arrested on the charge of being a deserter from the army of the United States; that he never was

enlisted in the military service of the United States so as to be liable for desertion; that the enlistment, if any such was set up, was illegal and void, because the petitioner was over thirty-five years of age at the time of the pretended enlistment; that the petitioner was wrongfully and illegally restrained of his liberty on the said charge of desertion; that the petitioner was not guilty of the offense of desertion, and that he was restrained of his liberty by Captain Campbell, of the Fourth United States Artillery, at Fort Warren.

To the writ issued upon this petition Captain Campbell made return that the petitioner was held as a prisoner by him by virtue of a commitment contained in general court-martial orders No. 46; that he was duly tried by general court-martial, convened at Fort Warren, for the crime of desertion; that the court was of competent jurisdiction; that the respondent pleaded and tried to establish that he had not been properly enlisted in the service of the United States; that the court found him guilty of the offense charged, and sentenced him to be confined at hard labor for six months and to forfeit $10 per month of his pay and half of his clothing allowance for the same period. He requested that the prisoner be remanded to his custody.

By agreement between the parties, certain papers were put in evidence before the circuit court, and were made part of the record. These included the record of the trial and sentence of the prisoner by the court-martial, the petitioner's enlistment, and other papers.

The record of the convening of the court-martial shows that it was organized in accordance with Articles of War, Nos. 71 to 121, inclusive, and that its finding and sentence

were duly approved by the commanding officer ordering the court-martial.

It appears from the evidence adduced before the court-martial that on the 18th day of February, 1888, the respondent, John Grimley, went to the United States recruiting office in Portland street, Boston, with the intention of enlisting in the Army (Rec., pp. 7, 14, and 15). He presented himself to Capt. James Miller, of the Second United States Infantry, the recruiting officer at that point, and stated that he wished to enlist in the Army. He was closely examined by the officer (Rec., p. 8) to see if he could account for his desire to enlist, and to make certain "that he was not then under the influence of liquor or suffering from the effects of a recent spree." He gave a full and apparently frank account of his life for some time previously, and detailed the circumstances beyond his control that had placed him in a situation where enlistment was about the best thing he could do. There was nothing in the matter or manner of his answers to suggest that his faculties were disturbed, and his intelligence was certainly above the average. The 47th Article of War, which defines the crime of desertion and prescribes its punishment, was read to him by the recruiting officer (Rec., p. 9). He made the following declaration:

> I, John Grimley, desiring to enlist in the Army of the United States for the term of five years, do declare that I have neither wife nor child; that I am of the legal age to enlist, and believe myself physically qualified to perform the duties of an able-bodied soldier; and do further declare that I have never been

discharged from the United States service (Army or Navy) or any other service on account of disability, or by sentence of either civil or military court, or in any case except with good character and for the reasons given by me to the recruiting officer prior to this enlistment.

Given at Boston, Mass., this 18 day of February, 1888.

JOHN GRIMLEY.

Witness:

CHARLES CONAHAN.

(Rec., p. 21.)

He took the following oath (Rec., p. 20):

STATE OF MASSACHUSETTS,

City or town of Boston, ss:

I, John Grimley, born in Armagh, in the State of Ireland, aged twenty-eight years and — months, and by occupation a groom, do hereby acknowledge to have voluntarily enlisted, this 18th day of February, 1888, as a soldier in the Army of the United States of America for the period of five years, unless sooner discharged by proper authority; and do also agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever; that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and Articles of War.

JOHN GRIMLEY. [SEAL.]

Subscribed and duly sworn to before me this 18th day of February, A. D. 1888.

JAMES MILLER,

Captain 2d Infantry, Recruiting Officer.

The recruiting officer then made the following certificates (Rec., p. 21):

> I certify, on honor, that I have carefully examined the above-named man agreeably to the general regulations of the Army, and that, in my opinion, he is free from all bodily defects which would, in any way, disqualify him from performing the duties of a soldier.
>
> JAMES MILLER,
> *Captain 2d Infantry, Examining Officer.*

> I certify, on honor, that I have minutely inspected the above-named man, John Grimley, previous to his enlistment, and that he was sober when enlisted; that, to the best of my judgment and belief, he is of lawful age, and that I have accepted and enlisted him into the service of the United States under this contract of enlistment as duly qualified to perform the duties of an able-bodied soldier, and, in doing so, have strictly observed the regulations which govern the recruiting service. This soldier has blue eyes, d'k brown hair, ruddy complexion, is 5 feet 7 inches high.
>
> JAMES MILLER [SEAL.]
> *Captain 2d Infantry, Recruiting Officer.*

Upon pages 22, 23, and 24 of the record appear the questions put to Grimley by the inspecting officer, and his answers in which he gave his age as twenty-eight years. After the foregoing enlistment papers had been completed, he was turned over to Sergeant Charles Conahan, who took charge of him (Rec., p. 10). He took him upstairs to issue to him his uniform. A military cap, blouse, overcoat, blanket, pair of trousers, blue shirt, and a pair of cotton stockings were taken from the shelves and put on the

table before Grimley while he was in the room, and he signed a receipt for these articles. They were valued at about $25 (Rec., pp. 8, 10, and 12). Leaving the clothing there, he applied to the sergeant for permission to go home to see his mother (Rec., p. 10), which was granted. He was directed to return in a short time (Rec., pp. 11, 15).

When he told his mother that he had enlisted, she was in such a state of grief that he feared she would die. He did not therefore return to the recruiting office at all. She says she went, and met some persons in uniform, who told her it was all right; for him to go to work. He probably left the city, because the officer employed a detective to find him, who did not succeed in placing him until May, 1888, when he returned to the city (Rec., p. 7 and 8). Grimley nowhere denies that he left the city.

It is agreed between counsel that the court found as a fact that Grimley was over forty years of age at the time of his enlistment.

ASSIGNMENT OF ERRORS.

The circuit court erred in holding that John Grimley was not within the jurisdiction of the court-martial for trial as a deserter, and in discharging him from the custody of the military authorities.

ARGUMENT.

Concerning the right of the United States courts in habeas corpus proceedings to set aside sentences of courts-martial.

A court-martial is a court of limited and inferior jurisdiction. Granted its jurisdiction to act, no civil court can

revise its findings. But it must be conceded that if its jurisdiction is questioned, the facts upon which that jurisdiction depends may be inquired into by a United States court in a habeas corpus proceeding, and if the jurisdictional facts are found not to exist, then the proceedings of the court-martial may be held for naught, imprisonment thereunder be declared illegal, and the prisoner released. Speaking generally, the jurisdictional fact in all court-martial proceedings is that the person subjected to them shall have the status of a soldier. A United States court may therefore re-open the question whether such was the legal status of the person over whom the court-martial sought to assert jurisdiction, and if it finds that it was not, then it is the duty of the court to release him.

In solving the question of status, we find in the Articles of War two sections which bear upon the limits of military jurisdiction.

No. 64 of the Articles of War, section 1342, provides:

> The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall at all times and in all places be governed by the Articles of War, and shall be subject to be tried by courts-martial.

Article 47 of the same section provides:

> Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.

Article of War No. 64 came from the third section of the act of July 29, 1861 (12 Stats., 282), passed for the suppression of the rebellion and to amend the militia act of February 28, 1795. This section provides that:

> The militia so called into the service of the United States shall be subject to the same Rules and Articles of War as the troops of the United States, and be continued in the service of the United States until discharged by proclamation of the President.

It was evidently continued in the Revised Statutes for the purpose of extending the operation of the Articles of War to militia and troops other than the regular troops of the United States, and not for the purpose of marking with exactness when recruits for the regular Army become subject to military jurisdiction.

Article 47 has been enforced in substantially the same form ever since 1806 (2 Stats., 362). The proper construction of its language will show when the military jurisdiction over the recruit begins. By its terms a soldier who has received pay, or who has been duly enlisted, is subject to court-martial for desertion. Grimley had not received pay. Was he then duly enlisted? Upon this question turns the case at bar.

The contention for the appellee.

From the opinion of the circuit court, and the briefs submitted to that court by the counsel for Grimley, it is understood that the argument in his behalf may be stated as follows:

First. Grimley was not duly enlisted when he left, be-

cause his enlistment was not complete. Before he could be assigned to a regiment he was still liable, under Army Regulations, to be rejected for physical and other disabilities by a board of inspection.

Second. He was not duly enlisted because the articles of war were not all read to him before taking the oath, as required by the statute.

Third. His enlistment was void, because in violation of section 1116, Revised Statutes, which requires recruits to be under thirty-five years of age.

These arguments will be considered in their order.

I.

When he took the oath Grimley's enlistment was complete, notwithstanding the fact that he might have been rejected before assignment to a regiment.

It becomes important in this discussion to determine what constitutes the enlistment of a soldier. It is conceded that an enlistment is the change from the civil to the military status. It is not the mere listing of the name upon the military rolls, but it is that act or series of acts, by which the civilian becomes the soldier. We are fortunate, in considering the question, to have a very learned and instructive opinion upon the meaning of the word "enlistment," in this connection, by Mr. Justice Gray, delivered by him as the judgment of the supreme judicial court of Massachusetts in the case of *Tyler* vs. *Pomeroy* (8 Allen, 480). There the question was whether an arrest was actionable. The defense was that the plaintiff was a soldier, and subject to the command of defendants, who ordered the arrest. One issue was whether plaintiff was a soldier at the time of his arrest.

Mr. Justice Gray states the question as follows (p. 485):

> Was the plaintiff, then, at the time of the acts of which he complains, a soldier? The words "enlist" and "enlistment" in the law, as in common usage, may signify either the complete fact of entering into the military service, or the first step taken by the recruit towards that end. If this ambiguity is not borne in mind, the consideration of this matter may degenerate into a dispute about words. The question before us is no ordinary one of the force, construction, or validity of a contract—whether the plaintiff has made an agreement and broken it, and is liable in damages for the breach; but of a change of *status*—whether by signing a particular paper, or by any other act, the plaintiff has changed his condition, given up some of the rights of a private citizen, and become amenable to military discipline. It becomes necessary, therefore, to ascertain the boundary between the civil and military status, and to inquire what acts, by the principles of the common law or the American constitutions, or by express provision of statute, are required to change a citizen into a soldier. By tracing the history of the mode of enlisting soldiers under the law of England, out of which our law grew, we shall be enabled more satisfactorily to answer this question.

It is contended on behalf of the United States that the enlistment is complete, and the military status is entered, when the recruit for the regular Army of the United States, having formally declared his intention to enlist, and after examination and acceptance by the recruiting officer, takes the oath of allegiance before a commissioned officer. This will appear—

First. From the history of the English and American law of enlistments;

Second. From the language of the Revised Statutes;

Third. From the construction of the contract of enlistment; and

Fourth. From the actual military discipline and authority to which the recruit after taking the oath is at once subjected by Army Regulations having the force of law.

The history of the mode of enlistment.

In the case of *Tyler* vs. *Pomeroy*, *supra*, Mr. Justice Gray, after an examination of the earlier modes of making a civilian a soldier, proceeded (p. 490):

> After the accession of William and Mary, a standing army being found necessary, parliament retained control of it by establishing it for only a year at a time; and these annual acts first made mutiny and desertion punishable at the sentence of the court-martial in time of peace, and are therefore known as the Mutiny Acts. The earliest of these was limited to persons "being in their majesties' service in the army, and being mustered and in pay as an officer or soldier." *St.* I. W. & M., *c.* 5, § 2. This clause was reënacted in the same form, thus requiring both mustering and pay to constitute the military character until early in the following reign, when either was made sufficient, and the act extended to "every person in her majesty's service in the army, or mustered, or in pay as an officer, or listed or in pay as a soldier." *Sts.*, 6 Anne, *c.* 18, (often cited as 5 & 6 Anne, *c.* 16), § 2; 7 Anne, *c.* 4. But within five years after the passage of the first mutiny act, a section was inserted providing that no person should be "esteemed a listed soldier, or be subject to any of the pains or penalties of this act, or any other penalty for his behavior as a soldier," unless he

> should before a civilian magistrate "declare his free consent to be listed or mustered as a soldier, before he should be listed or mustered, or inserted on any muster roll of a regiment, troop, or company." *St.* 5 & 6 W. & M., *c.* 15 § 2. And the law of England has since by similar provisions required either enlistment by a military officer, with full opportunity to reconsider and retract, in the case of the soldier, or actually being mustered or commissioned in the case of an officer, to subject either to military discipline; allowing, however, the alternative of being in pay to avoid the necessity of discussing the nature of the engagement or mode of contracting it.

And a number of authorities are cited to sustain this conclusion.

Coming then to the American law upon the subject, the justice continued (p. 491):

> The articles of war reported by the committee of which Adams and Jefferson were members, and established by the Congress of the Confederation in 1776, within three months after the Declaration of American Independence, substantially adopted the provisions of the English mutiny acts; and required every recruit to be enlisted by a military officer and taken before a civil magistrate and there have the articles of war read to him and take the oath of allegiance and service; yet allowed the receipt of pay from the government to be conclusive evidence of enlistment; and declared that "all officers and soldiers who, having received pay, or having been duly enlisted in the service of the United States, shall be convicted of having deserted the same, shall suffer death or such other punishment as by sentence of a court-martial shall be inflicted;" and that these articles "are to be read every two months at the head

of every regiment, troop, or company, mustered or to be mustered in the service of the United States; and are to be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the said service." Articles of War of September 20, 1776, § 3, art. 1; § 6, art. 1; § 18, art. 1; 2 Journals of Congress, 367, 369, 380; 3 John Adams's Works, 83, 84.

After all powers of war and peace had been granted by the Constitution to the national government, the Congress of the United States established similar articles. U. S. Stat. 1806, *c.* 20, arts. 10, 20, 101; 2 Sts. at Large, 361, 362, 371. The oath was permitted, by the *St.* of 1806 to be taken before the judge advocate, and by the *St.* of 1861, *c.* 42, § 11, before any commissioned officer of the army. 12 U. S. Sts. at Large., 289. Taking the recruit before the civil magistrate is thus dispensed with, but his engagement with a military officer is essential.

It is evident from this history of the English mode of enlistment that the taking of the oath of allegiance marked the time when the status of the recruit was changed from that of a civilian to that of a soldier. The time between the enlistment before a commissioned officer and the taking of the oath before the civil magistrate was the *locus poenitentiæ* for the recruit. If there was still opportunity after the oath, for the recruit to withdraw, the time for deliberation so specifically required would be pointless and purposeless. There is no substantial difference between the present law and the English law or the articles of war adopted at the beginning of the Revolution in respect to the irrevocable character of the oath. There is still time between the enlistment and the taking of the oath for

deliberation and retraction. Article 2, section 1342, provides that:

> These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation in the following form, etc.

And Par. 766 of Army Regulations, 1881, is as follows:

> The forms of declaration and of consent in the case of a minor, having been signed and witnessed, the recruit will then be duly examined by the recruiting officer and surgeon, if one be present, and if accepted, the 47th and 103d Articles of War will be read to him, after which he will be allowed time to consider the subject until his mind appears to be fully made up before the oath is administered to him.

The oath taken in the case of *Tyler* vs. *Pomeroy* (*supra*) was held not to change the status of the recruit because it was not preceded by an enlistment in the United States army. It was a mere agreement in the form of an oath to enlist at a future day in the army of the United States, made not with the military authority, but with municipal officers, who were not authorized to enlist for the United States. *Banfield* vs. *Abbott* (9 Law Reporter, 510) was a case on all fours with *Tyler* vs. *Pomeroy*.

The words of the statute show the oath to be the final step in the enlistment.

Section 1342, article 2, as we have seen above, provides that "these rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment,

and he shall thereupon take an oath or affirmation," etc. Article 4 provides that "no enlisted man, duly sworn, shall be discharged from the service without a discharge in writing."

The words "enlisted man, duly sworn," in article 4, refer to a man who has complied with article 2, so that article 4 might just as well read, "No man who has after enlistment been duly sworn as provided in article 2 shall be discharged from the service without a discharge in writing." It follows necessarily that a man who has been sworn as provided in article 2 is in the military service, for otherwise how could he be discharged therefrom? Being in the military service he has the military status. The connection between article 2 and article 4 is much more clearly brought out by reference to articles 10 and 11 in the Rules and Articles of 1806 (2 Stat. L., 359), from which articles 2 and 4 were respectively revised. Article 10 provides that "every non-commissioned officer or soldier who shall enlist himself in the service of the United States, shall, at the time of his so enlisting, or within six days afterwards," have the articles read to him and be taken by his enlisting officer before a justice of the peace or chief magistrate, in any city or town, or before the judge advocate, and take the oath prescribed, whereupon the justice, magistrate, or judge advocate "is to give the officer a certificate, signifying that the man enlisted did take the said oath or affirmation." Article 11, immediately following and having direct reference to Article 10, reads as follows:

> After a non-commissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing.

In the Articles of War, adopted in the Continental Congress, the connection between these two articles is made even plainer by putting them in a section by themselves. (Articles of War, 1776, section III, articles 1 and 2, U. S. Military Laws, 64.)

The contract of enlistment shows immediate change of status.

While the discussion here is of status, this depends primarily upon a contract. The construction of the contract therefore must throw light upon the question when the change of the status happens. Marriage like enlistment is both a contract and a change of status. Parties contract to marry presently, and are married. If they agree to marry in the future, they make a contract to marry, which does not change their status. There is the same distinction between the case at bar and that of *Tyler* vs. *Pomeroy* (8 Allen, 480). The contract and oath upon which it was there sought to subject the plaintiff to military authority, was a contract to become enlisted in the army of the United States at some future day—was merely a contract to change status in the future—and could not of itself work that change. This distinction is pointed out with great clearness by Mr. Justice Gray. Grimley's contract, on the other hand was very different. It was expressed as follows:

> I do hereby acknowledge to have voluntarily enlisted this 18th day of February, 1888, as a soldier in the Army of the United States for the period of five years, unless sooner discharged by proper authority.

The necessary effect of such language is to make the contract of present operation. He uses the perfect tense as of something which has been done—as of a status already changed. It is conceded that under article 2, section 1342, not only the entering into this contract, but also the oath is necessary to make the soldier. Were it not, however, for the statutory requirement of the oath, the effect of the contract, as a contract, would be to immediately change the status.

The Regulations of the Army subject the recruit to military authority and discipline as soon as the oath is taken.

Again, the fact that the status is changed is shown by the actual condition of the recruit under the Army regulation as soon as the oath has been taken. The distinguishing feature of the status of a soldier is that of subordination to a superior. The strongest evidence of the change, therefore, from the civil to the military status of the recruit is the existence, provided for by law and regulations, of his relation of subordination to an ascertained military superior.

Paragraph 777, Army Regulations of 1881, provides that—

> The recruiting officer will see that the men under his command are neat in their personal appearance, and will require the permanent party to wear their military dress in a becoming manner, especially when permitted to go abroad.

Paragraph 778:

> The instruction of the recruits will commence at the rendezvous from the moment of enlistment. The

general superintendent will see that all recruiting officers give particular attention to this subject.

Paragraph 779:

> Recruits will be sent from rendezvous to depots every ten days, or oftener if practicable, provided the number disposable exceeds three. The detachments of recruits will be sent from rendezvous to depots under charge of a non-commissioned officer.

Board and lodging are furnished the recruit while at the rendezvous. (See paragraph 797, 798, and 799.) By paragraph 776, a military uniform may be furnished to the recruit at the rendezvous.

Army regulations have the force of law. *Gratiot* vs. *United States* (4 Howard, 93). It is therefore clear that by law the recruiting officer is the superior officer of the recruit after he has taken the oath; that he may command him to be neat in his appearance; that he may instruct him in regard to his duties as a soldier; that he may order him to go from the rendezvous to the depot in command of the sergeant; that while at the rendezvous the recruit may wear the military uniform; and that he is given board and lodging by the Government. It would be difficult to state more completely the essentials of the military status.

In Grimley's case he had received a uniform. Could anything more clearly mark the military status of a man than the military livery of the Government? Grimley did not put his uniform on, but he had the right to wear it. He had not received board and lodging from the Government when he deserted. This does not, however, make the foregoing argument inapplicable to his case. The question is:

At what time does the status change? In showing that it changes at the time the oath is taken, the condition of the recruit immediately following the oath becomes important. The fact that Grimley did not enjoy all the privileges which the taking of the oath gave him can not make his case different, so far as his due enlistment is concerned, from that of recruits who remained at the rendezvous and were treated as the regulations prescribed. Grimley recognized that he had become subject to military discipline, for he asked permission of his commanding officer, the sergeant, to leave the rendezvous.

Liability to rejection for disability is no aid in determining the time when the military status is assumed.

The claim is made, that inasmuch as the recruit on taking the oath has not been finally accepted and may be rejected upon inspection at the depot (par. 821–826, Army Reg. 1881), he can not be said to have been duly enlisted or to have become a soldier. The fact that the Government through its officers may withdraw from the contract of enlistment is no evidence that the contract is not in force and in present operation; for, it is in the nature of a contract of enlistment that the Government may withdraw from it at any time. The contract by the recruit is to serve for five years, or until discharged by proper authority. A soldier who has served any part of his term may be discharged by order of the President, the Secretary of War, or the commanding officer of a department. (Section 1342, article 4.) The discharge by the board of inspection at the depot can not be made except upon the approval of the Adjutant-General (par. 284), who, in mat-

ters of this kind, is the representative of the Secretary of War and the commanding general.

The trouble with the argument of counsel based upon the possibility of rejection is that it proves too much. It is apparent from paragraphs 821 and 822 of the Articles of War that not only is there an inspection when the recruits arrive at the depot from the rendezvous, but there is one just before they leave to join the regiments to which they are assigned. If the argument is sound, a recruit is not a soldier or subject to military authority until he leaves for his regiment. Now, we find that under paragraphs 808 to 820 inclusive there are assigned a suitable number of officers to command and instruct the recruits while at the depot (par. 809). Recruits are to be dressed in uniform according to their respective arms, and are to be regularly mustered and inspected; they are to be well drilled in the infantry tactics, through the school of the soldier to that of the battalion, and in the exercise of field and garrison pieces (par. 810); appointments are to be made, from their number, of lance corporals and lance sergeants, to continue in force until they join their regiments, and such officers are to have all the authority of regular sergeants and corporals (par. 812); recruiting parties and recruits are to be mustered, inspected, and paid in same manner as other soldiers (par. 816).

It would be difficult to make provisions which should subject recruits to a more complete military discipline. Yet, while undergoing this drill, muster, and instruction, by the argument of counsel these recruits are not soldiers or subject to the articles of war. They may therefore desert or refuse to obey orders with impunity. A drill un-

der such conditions would be an edifying spectacle. Such a result is absurd and shows the fallacy of the theory that the mere right of the Government to reject a recruit continues him in the civil status.

Reliance is had by counsel for Grimley, on the case of *United States* vs. *Thompson* (2 Sprague's Decisions, 103). This was a criminal prosecution under section 11 of the act of March 2, 1855 (10 Stats., 628), providing that "any person who shall entice any seaman, ordinary seaman, landsman, or boy, who may have enlisted into the naval service of the United States, to desert therefrom" shall, on conviction, be punished by fine or imprisonment. The person whom the defendant was charged with having enticed was examined and passed by the surgeon at the naval rendezvous and by the recruiting officer of the rendezvous. He took the oath, signed the naval shipping articles, which stated among other things his term of enlistment and date of enlistment, and received an order from the recruiting officer for advanced pay and bounty, to be given him on his delivery on board ship in good order and time. He went to the receiving-ship, but was so intoxicated that the commanding officer refused to receive him until he became sober. He left the ship, saying he would report in the morning. Before that time the defendant met him and induced him to enlist in the Army.

Judge Sprague decided that the person enticed had not been enlisted. He said:

> The regulations provide that the name of the recruit shall not be entered upon the books of the receiving-ship or his advance paid him until, after an examination by the commander of the ship and his medical officer, he shall be found fit for service; and that then, and not

till then, he shall be entitled to and receive his advance. He is not received as a seaman until then, he is not entitled to anything till then. The papers received from the officer in command of the rendezvous do not entitle him to get his advance, unless he has passed the surgeon on board the receiving-ship. They are merely documents to enable the recruit to pass the next stage in the proceedings; but he is not entitled to anything on these alone.

Now, if the seaman, on signing the papers and passing the rendezvous, was not entitled to anything, then the contract for service on the one hand, and pay on the other, had not been completed: the seaman had not enlisted, and so was not a deserter.

It is evident from this statement of the naval regulations in force at the time that the status of a naval recruit at the naval rendezvous was by no means that of an army recruit at the army rendezvous.

The naval recruit was not in charge of any one in going from the rendezvous to the receiving ship. There was no relation of subordination to the recruiting officer established. The recruit received no clothing at the rendezvous. He received no instructions. He was subject to no discipline.

The case of *U. S.* vs. *Thompson* involved a criminal statute, of which the accused is always given the benefit of the strictest and narrowest construction. It is contended on behalf of the United States that the decision of Judge Sprague can not be sustained; but even if it must be taken to be the law, the difference in the circumstances of an army and a navy recruit pointed out above are quite sufficient to distinguish the case at bar from the case cited.

II.

Statutory direction as to reading Articles of War was sufficiently complied with.

The point was made in the court below by counsel for Grimley, that, because article 2, section 1342, requires the Rules and Articles of War to be read to every enlisted man before the oath is taken, the failure of the recruiting officer to read all of them to Grimley prevents him from being duly enlisted.

Conceding that the reading of the Rules and the Articles is part of the form of enlistment, the provision for this is directory only, and not mandatory. To require the reading to the recruit of the twelve pages of the Revised Statutes taken up with the Articles of War, a large part of which do not concern the private soldier, and have no bearing upon his duties, would be absurd. The construction put upon this requirement by the officers charged with its execution for thirty years at least, is authority of the greatest weight in support of the view that the provision for the reading of the rules and articles is but directory. Paragraph No. 766 of the Army Regulations of 1881, which was paragraph 934 of the Regulations of 1863, is as follows:

> The forms of declaration, and of consent in case of a minor, having been signed and witnessed, the recruit will then be duly examined by the recruiting officer and surgeon, if one be present, and, if accepted, the 47th and 103d Articles of War will be read to him, after which he will be allowed time to consider the subject until his mind appears to be fully made up before the oath is administered to him.

If it is to be held that a failure to read twelve pages of the Revised Statutes to a recruit renders his enlistment unlawful, it is doubtful whether a single man in the rrmy of the United States has been enlisted lawfully for the past thirty years.

The object of the reading of the Rules and Articles of War before the man takes the oath, is to give him to understand the nature of the contract into which be is entering. It can not be said in this case that the contract was not entered into by Grimley with a full understanding of its effect. He was examined at great length, as appears from the record (p. 8), upon the reason for his wishing to enlist which, of course, involved a discussion of the life he was to lead as a soldier. He had one of the articles of war read to him—article 47. He was given a full opportunity to consider the matter. He says in his own evidence that he had made up his mind to enlist before he went there. When he came away, he knew he had enlisted, for he told his mother so. He had, therefore, in entering into the contract, the willing mind, and was fully aware of what he was doing.

III.

Grimley's age did not render his enlistment void, but only voidable at the option of the Government. Until the Government avoided the enlistment and discharged him from its service, he remained duly enlisted in the Army and subject to sentence by court-martial for desertion.

Section 1116, Revised Statutes, provides that--

> Recruits enlisted in the Army must be effective, able-bodied men, between the ages of sixteen and

thirty-five years at the time of their enlistment. This limitation as to age shall not apply to soldiers re-enlisting.

It is claimed on behalf of Grimley that this section renders his enlistment void, because at the time he was more than thirty-five years of age. There is nothing in the section expressly declaring that enlistments, not according to its terms, shall be void. If the enlistment of a man of forty years of age is void, then, too, an enlistment of a man not able-bodied is void, for both requirements are expressed in the same language. Can it be contended that the enlistment of a recruit disabled by some defect not apparent upon examination is null and void, and that he can subsequently present his own physical condition, and in the face of his own misrepresentation claim that his enlistment had no binding effect upon him from the beginning?

The point was made by Judge Colt, as an answer to a suggestion like the foregoing, that where a man was a *de facto* soldier he could be guilty of desertion even if his enlistment was void, but that Grimley was not a *de facto* soldier. To this it may be said that, as Grimley had come into an actual relation of subordination to an ascertained military superior, he was *de facto* in the military service when he deserted. Again, this position of Judge Colt is the same in effect as that laid down in one or two earlier cases, namely, that desertion in the face of the enemy, or when it would endanger the army is punishable as a military crime, though under other circumstances the illegality of the enlistment might completely oust the jurisdiction of the court-martial. The unsoundness of this position is

fully shown by Circuit Judge Sawyer in the case of *In re Zimmerman* (30 Fed. Rep., 176), where he says:

> But the statute in defining the offense of desertion says nothing about being in the presence of the enemy. The presence of the enemy is not made by the statute an element in the offense of desertion. Desertion is a statutory offense, and it is difficult to perceive why a party, under the terms of the statute, should be amenable to trial by military courts for the offense of desertion when he deserts in one place, when he would not by desertion in another.

The restrictions of section 1116 *are solely for the benefit of the Government.*

The only sections of the Revised Statutes having reference to persons who may be or may not be enlisted for service in the Army of the United States are sections 1116, 1117, and 1118, and No. 3 of the Articles of War, section 1342. Section 1116 is given above. Sections 1117 and 1118, and article 3, are as follows:

> 1117. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control.
>
> 1118. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of [*any criminal offense*] [a felony] shall be enlisted or mustered into the military service.

1342. ART. 3. Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offense, shall upon conviction be dismissed from the service, or suffer such other punishment as a court-martial may direct.

A consideration of these sections, taken with statutes from which they were revised, will throw light upon the intention of Congress in enacting section 1116. It is to be noted that the requirements of physical ability and maximum age are neither of them enforced by express prohibition, or by the specific imposition of any penalty upon any officer who shall disregard them, while every other requirement in the four sections is enforced in both ways.

Section 1116 expresses the purpose of Congress to have in the Army men who are physically effective, and the limitations as to age contained in the section, both minimum and maximum, are evidently introduced only as a means to that end. The limitations as to age in sections 1117 and 1118 are based on very different considerations. Section 1117 is a recognition of the right of the parent to the services of the minor and a prohibition of its violation. It is for the benefit of the parent. The section is taken without substantial change from the act of May 15, 1872. Enactments of a similar character have been in force since the foundation of the Government and always with the same purpose. *U. S.* vs. *Bambridge* (1 Mason, 86).

By a provision in section 20 of the act of February 24, 1864 (13 Stats., 10), as construed by section 5 of the act of July 4, 1864 (13 Stats., 380) the Secretary of War was required to discharge minors under the age of eighteen years on proof that such persons were in the service without the consent of their parents or guardians and on the condition that such parents or guardians should repay all bounties and advances. The condition plainly shows that the provision was inserted for the benefit of the parents or guardians, and was intended to give them an opportunity, by repaying what the Government had paid out, to secure again the services and control of the minors to which they were entitled. *U. S.* vs. *Brearly* (2 Southard, 555).

That part of section 1118 which prohibits the enlistment of minors under the age of sixteen years is taken from section 5 of the act of July 4, 1864 (13 Stats., 380), which provides that

> If any officer of the United States shall enlist or muster into the military service any person under the age of sixteen years, with or without the consent of his parent or guardian, such person so enlisted shall be immediately discharged upon payment of all bounties received.

It is evident that this section is for the benefit of minors under the age of sixteen years. The condition upon which it becomes operative leaves no doubt as to that. The minor is not to enjoy the benefit of it until he shall have returned the money received from the Government.

We may say then, generally, of the three sections that the limitation as to age in section 1116 is for the benefit of the Government in securing able-bodied men; that the

limitation as to age in section 1117 is for the benefit of the parent in securing to him the services of his child; that the limitation as to age in section 1118 is for the benefit of the boy, to protect him from his own immaturity and rashness. The limitation as to maximum age occurs only in section 1116. It follows that that limitation is for the benefit of the Government only, and a violation of it can be complained of by the Government only.

This view of the purpose of the limitation of maximum age is borne out by a note of the Revisers, contained in the draft of the revision printed for examination by the committee of the House of Representatives on Revision of the Laws (Com. D., vol. 1, page 589, title 14, section 23). The note is as follows:

> After a careful examination of all the acts relating to recruits, it is clear that the provision of the act of the 16th March, 1802, chapter 9, which limits the maximum age to thirty-five years, has never been repealed. In every exigency for additional troops provision has been made for enlistments at a greater age, but those provisions were temporary and did not repeal the general statute. It has been ascertained by the commissioners, however, that the limitation of thirty-five years has not been regarded by the recruiting officers as in force.
>
> *It appears clearly in the terms of several statutes that Congress has deemed the minimum age of recruits a question not of personal fitness but of public policy. It has been made a crime to admit persons of tender age into the military service. But the fitness of a mature man has been treated as a question of actual fitness to be ascertained by careful inspection.* These inspections are amply secured by law as well as by the

interests of the Army. When men have been needed for serious purposes the limitation of thirty-five years has been pronounced impolitic by the act of allowing a greater maximum age.

What is said by the commissioners in regard to the limit of maximum age is amply sustained by reference to the history of the legislation on the subject. By section 5 of the act of January 20, 1813 (2 Stats., 792), in the gloom of the war of 1812, Congress offered a premium of $4 for the enlistment of every effective, able-bodied man between the ages of eighteen and forty-five years. By the act of March 3, 1863 (12 Stats., 731), known as "the draft act," there were enrolled all persons between the ages of twenty and forty-five years. Even under the law as it is the Army now lawfully contains many soldiers whose age exceeds thirty-five years. There is no public policy opposed to enlisting men of greater age than thirty-five. The limitation is merely a convenient way of decreasing the chance of physical defect in recruits. In the opinion of Congress the advantage of previous military experience outweighs any probability of physical defect in persons older than thirty-five years; and the limit of maximum age is, therefore, not made applicable to soldiers re-enlisting.

As has been said, no penalty is attached to enlisting a man over thirty-five years of age, or a man who is not effective and able-bodied, and the restriction is not in prohibitory form. It is only when the rights of the individual, either as a parent or as a youth of tender years, are likely to be injuriously affected by enlistment that a severe penalty is provided to prevent their violation. Congress

doubtless felt that with the absolute power of discharge and of inspection the Government could easily protect itself from the presence in the army of soldiers not effective and able-bodied. For the same reason, it is very improbable, that Congress should deem it necessary, or intend, to absolutely avoid enlistments in violation of section 1116.

Section 1116 *is to be construed as an instruction to recruiting officers.*

It is hoped that the foregoing remarks have made it clear that the requirements of section 1116 are for the benefit of the Government. It remains to show that the section is to be regarded as defining the duties of recruiting officers in enlisting men for the service of the army of the United States.

Section 1116 of the Revised Statutes is a revision of the first clause of section 11 of the act of March 16, 1802, defining the peace establishment of the army of the United States (2 Stats., 134). The whole section is as follows:

> That the commissioned officers who shall be employed in the recruiting service to keep up by voluntary enlistment the corps as aforesaid shall be entitled to receive for every effective able-bodied citizen of the United States who shall be duly enlisted by him for the term of five years, and mustered, of at least five feet six inches high, and between the ages of eighteen and thirty-five years, the sum of two dollars: *Provided, nevertheless,* That this regulation, so far as respects the height and age of the recruit shall not extend to musicians or to those soldiers who may reenlist into the service: *And provided also,* That no

> person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent, guardian, or master first had and obtained, if any he have; and if any officer shall enlist any person contrary to the true intent and meaning of this act, for every such offense he shall forfeit and pay the amount of the bounty and clothing which the person so recruited may have received from the public, to be deducted out of the pay and emoluments of such officer.

Section 1116 is made up from the first clause and the first proviso. By section 5 of the act of March 2, 1833, "An act to improve the condition of the non-commissioned officers and privates of the army, and to prevent desertion" (vol. 4, Stats., 647), it was enacted that—

> No premium to officers for enlisting recruits, nor bounties to recruits for enlisting, shall be allowed after the passage of this act.

This was a repeal of the premium, and as the first clause and proviso were in form the granting of the premium, it might be construed into a repeal of the requirements in section 11 of the act of 1802, but the penal clause at the end of section 11 of the act of 1802 still made the qualifications prescribed in the first clause of the section an instruction to the recruiting officers in enlisting recruits.

By section 30 of the act of July 5, 1838 (5 Stats., 260), the requirement as to height was repealed. With that exception section 11 of the act of 1802, as modified by section 5 of the act of 1833, above referred to, continued in force until December 1, 1873, when the Revised Statutes took effect. The operation of the act may have

been suspended by temporary laws, but it never was repealed. In the revision the requirement that the enlisted man should be a citizen was omitted, and the minimum age was reduced to sixteen years. The requirement as to maximum age was made inapplicable to re-enlisting soldiers only, and not to musicians. The form of the regulation was changed.

It is entirely clear from decided cases that section 11 of the act of 1802 was directory, defining the duties and marking the scope of authority of recruiting officers in the United States army and that it was not prohibitory.

In the case of the *United States* vs. *Wyngall* (5 Hill, 16), Wyngall sought by a writ of habeas corpus to obtain his discharge from the United States army on the ground that he was an alien. The act of 1802 provided for the enlistment of able-bodied *citizens*. It appeared that Wyngall was a subject of Great Britain, who had enlisted in the army of the United States, and that his enlistment was regular in form. It was held that the statute of 1802, section 11, was in its nature directory only and not mandatory, and that the United States might adopt the act of a recruiting officer who made a mistake as to the qualifications of a man enlisted who was not properly qualified. The court was made up of Chief-Justice Nelson and Judges Bronson and Cowen. Said Judge Cowen, speaking of that part of section 11 embodied in section 1116, Revised Statutes:

> No doubt it has properly been considered by the War Department as containing directions which should be followed; but giving it the greatest possible effect, it is plain that all the restrictions are for

> the benefit of the Government, not the recruit; and if a departure did not contravene some general principle of public policy the question would seem to lie entirely with the Government whether it will forego the requisites wanted by its new recruit or dismiss him. *Quilibet potest renunciare juri pro se introducto.* An officer, for instance, engaged in the recruiting service, chooses to enlist a man over the age or less than 5 feet 6 inches in height. He is mustered, and the proper agents of the Government insist on holding him to his contract. There is nothing either in the words or intent of the statute entitling the recruit to avoid his bargain because he failed in those things which the Government would have preferred. It may punish the officer for his carelessness or delinquency, but on the statute no other consequence would follow.

In the case of *U. S.* vs. *Cottingham* (1 Robinson's Va. Repts., 615) Cottingham filed a petition in habeas corpus and sought to be discharged from the army on the ground that he was an alien. Referring to section 11 of the act of 1802, Baldwin, J., delivering the opinion, says:

> It will be seen that the qualifications prescribed by this act of Congress for the regulation of the recruiting officer are, (1) That the recruit shall be effective and able-bodied; (2) That he shall be a citizen of the *United States;* (3) That he shall be at least 5 feet 6 inches high; (4) That he shall be between the ages of eighteen and thirty-five years. These requisites were obviously designed for the benefit of the Government, and in order to obtain recruits best fitted for the service. They are all placed on the same footing without discrimination; all based upon the idea of qualification alone; all embraced in the same mandate, and all enforced by the same penalty. It is

> impossible to distinguish between the want of citizenship and the want of any other qualification; and if a recruit be entitled to his discharge because he is an alien, he would be equally entitled to it because only five feet five inches and eleven-twelfths in height, or thirty-five years and oneday old. There is no better rule of interpretation than this, that "no statute shall be construed in such a manner as to be inconvenient or against reason." If a recruit were to claim exoneration from the service on the ground that at the time of his enlistment he was under size or under age, or infirm in body, would it not be a sufficient answer that the Government in its discretion waived the objection, because he had since attained the requisite height or age, or had recovered, or would probably recover from his disease, or because he possessed qualities which would more than compensate for his alleged deficiencies?

The question we are considering is whether section 1116 is to be construed as facultative and directory, or prohibitory. It may be conceded that the language of the section will bear either construction. In such case, the act from which it is derived is of conclusive force in determining which is to prevail. In *U. S.* vs. *Bowen* (100 U. S., 513) Mr. Justice Miller, referring to the principle just stated, says:

> This principle is undoubtedly sound; and, where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information. The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the 1st day of December, 1873. When the meaning is plain the courts can not look to the statutes which have been

> revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress. If, then, in the case before us, the language of sec. 4820 was fairly susceptible of the construction claimed by the Government, as well as of the opposite one, the argument from the provision of the statute as it stood before the revision would be conclusive.

Using section 11 of the act of 1802, as construed by the supreme court of New York and the court of appeals of Virginia to aid us, can there be any doubt that section 1116 R. S. is to be treated as a statutory instruction to recruiting agents of the Government in enlisting men for the army and that it is facultative and not prohibitory? (1 Winthrop on Military Law, page 769.)

The recruiting officer has implied power to decide upon the qualifications of the recruit.

Who is to decide upon the qualifications of recruits? Manifestly, the officer charged with the duty of enlisting the men. The moment it is established that section 1116 is to be regarded as an instruction to recruiting officers, such power arises by necessary implication on principles of the law of agency. If, from the evidence available, the recruiting officer finds that a man who presents himself comes within the prescribed qualifications, he acts within the scope of his authority, in enlisting him, no matter what are the man's actual qualifications. A contract has then been made, whose obligations neither the Government nor the recruit can disregard until it has been rescinded. If the recruit has misrepresented any

fact as to his qualifications, the Government may repudiate the contract. But it would be contrary to every principle of law governing the rescission of contracts to permit the recruit to take advantage of a failure of qualification on his part, prescribed solely for the benefit of the Government, and on that ground repudiate his contract. Still less could a repudiation by the recruit be permitted when he must base it on his own fraud. He is estopped to show the falsity of the statement upon which he induced the Government to enlist him. *In re Cosenow* (37 Fed. Rep., 68); *In re Mc Vey* (23 Fed., 878); *U. S.* vs. *Gibbons* (24 Fed. Rep., 135).

The Government has not repudiated the enlistment in the case at bar. Mrs. Grimley's account of her interview with persons at the rendezvous is much too vague and uncertain to warrant the conclusion that she ever saw any one there, and she does not claim that she saw the recruiting officer. The contract is therefore still in force; was in force both when Grimley deserted and when the court-martial heard the charges and convicted him.

There was no duty on the part of the military authorities under section 1116 *to avoid the enlistment under the circumstances of this case.*

If it be argued that the effect of section 1116 is to make it unlawful for the officers of the United States to retain, in the army, men whose want of qualification at the time of their enlistment is afterwards discovered, and to impose a duty on such officers of at once repudiating the enlist-

ment, it may be shown, without conceding the validity of such an argument, that it can not help Grimley.

In the first place, the duty, if it exists, is not owing to Grimley, and he can not invoke it in his aid. The officers may be punished perhaps for violation of their duty, but Grimley can not complain of it.

Again, when Grimley was enlisted, he led the recruiting officer to believe that he was within the lawful age; when he was tried by the court-martial he permitted his declaration that he was twenty-eight years of age to be introduced in evidence, did not deny its correctness, and therefore admitted it. Not until he had been sentenced by the court-martial, and had served part of his term, did he make it known that he was more than thirty-five years of age at the time of his enlistment. Then he was serving a sentence imposed upon him by a court-martial, deceived as to his age, for deserting a service which he had entered by deceiving the recruiting officer. So long as the deception remained unknown to the military authorities, there certainly was no duty on their part to discharge him. They were necessarily compelled to keep him as a lawfully enlisted soldier. He is now serving out a sentence of a military court, imposed under those conditions. The sentence, and its lawful character, relate back to the time of its imposition, and no disclosure of facts which, had they been known to the officers of the army and the military authorities, might have made it their duty to discharge him under other circumstances, (a proposition which is not conceded) can now interrupt or interfere with the effect of such a sentence. The case, in this view, is analogous to those sentences imposed near the end

of the term of enlistment of a soldier which detain him in custody, and for punishment, beyond the time when, but for the sentence, he could not be held by military authority.

Authorities show that even if contract of enlistment was voidable by Grimley, it is too late to avoid it after sentence by court-martial.

With the exception of *United States* v. *Wyngall* (5 Hill, 16), and *Cottingham* vs. *U. S.* (1 Robinson (Va.), 615), cited above, there are few authorities having a direct bearing upon the case at bar. The case of *Goodson* vs. *Caldwell* (2 *Winston* (N. C.) 135), has no application. It involved the right of a man not within the prescribed ages of an enrolment or draft act to refuse to be drafted. There are dicta in several cases to the effect that the enlistment of a minor under sixteen years, in violation of section 1118, is absolutely void, but no case has been found laying down this rule where the facts required such a decision. On the other hand there are several cases in which it has been held that the enlistment of a minor is voidable only, and that until he actually avoids it, either by notifying the military authorities of his wish to avoid it, or by habeas corpus proceedings, he remains subject to military authority, and that after a court-martial has taken jurisdiction over him it is too late to avoid his contract.

Thus in *McConologue's case* (107 Mass., 154), Mr. Justice Gray says that—

> A minor's contract of enlistment is indeed voidable only, and not void, and if, before a writ of habeas cor-

pus is sued out, he is arrested on charges of desertion, he should not be released by the court while proceedings for his trial by the military authorities are pending.

In the case of *In re Francis Dew* (25 Law Reporter, 538), Mr. Justice Merrick, of the supreme judicial court of Massachusetts, held that the contract of enlistment of a minor was voidable—not void; that until avoided, it must be treated as valid, and that the parties to the contract were subject to the consequences resulting from it; that if before avoidance the minor was charged with a military offense, and the jurisdiction of the military court had attached, the State court would not interfere by habeas corpus to withdraw the party therefrom. (See also *Commonwealth* vs. *Gamble* (11 S. & R. 93); *Green* vs. *Wilbur* (12 Johns, 73); Winthrop's Military Law, vol. 1, p. 779.

But whatever the rule in cases of minority under sixteen years, it has already been pointed out that the limitation as to maximum age is solely for the benefit of the Government, and not of the recruit, while the prohibition of section 1118 is undoubtedly for the protection of the minor. The limitation of maximum age, too, is not in form prohibitory like section 1118 and is not enforced as that section is by the penalties of article 3, section 1342. Authorities then with reference to the release of minors under sixteen years of age from enlistment could have no application to the case at bar, except such as may be used by way of an *a fortiori* argument in favor of the contention that the enlistment of a man of more than the prescribed age is not void.

The same remarks apply and similar distinctions may be made with respect to those numerous cases involving the right of a minor over sixteen years of age or his parents to secure his discharge from an enlistment entered into without his parents' consent. The overwhelming weight of authority in those cases is that such an enlistment is binding on the minor, is voidable only by his parents, and can not be avoided even by the parents to oust a court-martial from jurisdiction already assumed over the minor to try him for a military offense.

In re Beswick, 25 Howard's Practice Reports, 149.
In re Wall., 8 Fed. Rep., 85; decision Judge Lowell.
In re Davison, 21 Fed. Rep., 618; decision by Judge Wallace.
Menzes *vs.* Camac, 1 S & R., 87.
United States *vs.* Gibbon, 24 Fed. Rep., 135.
In re Zimmermann, 30 Fed. Rep., 176; decision by Judge Sawyer.
In re Hearn, 32 Fed. Rep., 141.
In re Cosenow, 37 Fed. Rep., 68; decision by Judge Brown, of Michigan.
In re Spencer, 40 Fed. Rep., 149.
In re Kaufman, 41 Fed. Rep., 876; decision by Judge Bond.
Ex parte Anderson, 16 Iowa, 595; decision by Judge Dillon.
In re Morrissey, circuit court E. D. Missouri, April 17, 18, 1889.

A contrary view has been maintained in—

Com. *vs.* Fox, 7 Pa. St., 336.
U. S. *ex rel.* Deming *vs.* Hanchett, 18 Fed. Rep., 26. (As to this case see Winthrop's Military

Law, Vol. 1, page 779, note 2.)
In re Baker, 23 Fed. Rep., 30.
In re Chapman, 37 Fed. Rep., 327.
In re Von Dieselskie, 5 Mackey's (D. C.) Rep., 485.

But in *Com.* vs. *Fox* and *U. S.* vs. *Hanchett* it was stated that the ruling might have been different if the minor was then undergoing trial by a court-martial, and in the case of *In re Baker* it was conceded that the minor could not himself avoid the contract.

It follows necessarily from these authorities that even if Grimley might have secured his release, by habeas corpus proceedings, his failure to do so and his desertion left his enlistment a contract binding on him and giving jurisdiction to a court-martial to try and convict him.

An apology is due the court for the length of this argument. The importance of the question and the fact that this is the first case brought to the Supreme Court involving a construction of section 1116, is its only justification.

On the several grounds above stated it is respectfully submitted that the court-martial in Grimley's case had jurisdiction; that the circuit court erred in discharging him; that the order of discharge should be reversed and an order entered remanding Grimley to the custody of the United States military authorities.

WM. H. TAFT,
Solicitor-General.

Supreme Court of the United States.

THE UNITED STATES,

APPELLANT,

v.

JOHN GRIMLEY,

APPELLEE.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

HENRY W. PUTNAM,
WILLIAM H. BROWN,
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BOSTON:
PRESS OF ROCKWELL AND CHURCHILL, 39 ARCH STREET.
1890.

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Supreme Court of the United States.

No. 1119. October Term, 1889.

THE UNITED STATES, Appellant,

v.

JOHN GRIMLEY, Appellee.

BRIEF FOR THE APPELLEE.

This is a petition for the writ of habeas corpus by John Grimley, for his release from imprisonment by the United States military authorities, as a deserter from the army, brought in the District Court for the District of Massachusetts. The decree of the District Court, and of the Circuit Court upon appeal, were both in favor of the petitioner, and the Government now appeals to this court. The case is reported in 38 Fed. Rep., 84.

The material facts disclosed by the record are as follows, the references being to the printed pages of the record: —

STATEMENT OF THE CASE.

On Saturday, February 18, 1888, John Grimley entered a recruiting rendezvous, on Portland street, in Boston, and expressed a desire to enlist in the cavalry. It is found by the Circuit Court that he was at the time over forty years of age. [See Agreement of Parties, p. 5.]

He first underwent a physical examination by the captain

[Miller] in charge of the rendezvous [Exhibits C and D, pp. 22–25], and took the oath of allegiance to the United States [Exhibit B, p. 20]. Grimley next signed the clothing-rolls in the office downstairs [Conahan, pp. 10–11], and was then taken in charge by the lance-sergeant [Conahan], who took him upstairs to the clothing-room to issue his uniform [Conahan, p. 10]. In the clothing-room, where the clothing is kept, the sergeant took from the shelf a cap, blanket, trousers, shirt, and a pair of stockings, and laid them on the floor in a small dressing-room across the hall [Conahan, p. 10, and diagram, p. 19]. The uniform was not put on by Grimley, except that a cap was put on his head and taken off again [Grimley, p. 14, bottom]; his attention was not called to the articles issued, — the clothing-rolls being signed by the recruit in blank, downstairs, and filled up afterwards, by the sergeant, with the articles issued [Conahan, p. 10, bottom, and McIntyre, pp. 12 and 13]; and he does not appear to have even entered the dressing-room [Conahan, p. 11, top].

Grimley then asked permission to go away and see his mother, and went away in citizen's clothes, after having been about a quarter of an hour at the rendezvous in all [John Grimley, p. 16, bottom], and with no definite time fixed for his return to the rendezvous [Conahan, p. 10, middle].

On returning to his mother and telling her of his intention, she was very much opposed to his entering the service, and urged him not to. He therefore changed his mind, and said he would go back to the rendezvous on Monday, and tell the men there of his change of intention. She, however, insisted on going herself instead, and was told at the rendezvous that "it was all right; that she might go home contented, and let him [John Grimley] go to his work" [Margaret Grimley, pp. 13, 14, and John Grimley, pp. 15, 16]. He, therefore, did not return to the rendezvous, went into the employ soon afterwards of William F. Day, Esq., of Boston, President of

the Sewall & Day Cordage Company, as coachman and hostler, and remained with him for two or three months [Exhibit B, p. 20, middle], until his arrest as a deserter, on May 16, 1888, and imprisonment in Fort Warren [Miller, p. 7, middle].

On May 24, a general court-martial met at Fort Warren, and proceeded to the trial of John Grimley, on the charge of desertion, with the specification that he deserted "on the day of his enlistment," February 18, 1888, and "did remain absent in desertion until apprehended" on May 16, 1888 [p. 7, top]. The prisoner pleaded "not guilty" to both charge and specification [p. 7, top], conducted his defence in person without the aid of counsel, and made no defence specifically on the score either of his age or the incompleteness of his enlistment [Court-martial proceedings, pp. 7, 19, and *passim*]. On May 28, 1888, he was found guilty and sentenced "to be confined at hard labor under the guard at such posts as the commanding general may direct for six months, forfeiting ten dollars per month of his pay and one-half of his clothing-money for the same period" [p. 18, middle]. On May 31 the proceedings were read and approved, and on June 6, 1888, the commanding general approved the sentence and ordered it to be executed at Fort Warren [p. 19, top].

The court-martial made a special finding that Grimley did not receive the alleged issue of clothing, and deemed the fact of sufficient importance to call the attention of the reviewing authorities to the same [p. 18, middle].

The petition for habeas corpus was filed and the writ issued on June 22, 1888, returnable June 25 [pp. 1, 2]. The return, dated June 25, sets up the sentence of the court-martial as a defence, and on that day Grimley was discharged by the District Court [pp. 2, 3], and the Government appealed to the Circuit Court, which, on February 27, 1889, affirmed the decree of the District Court [p. 3, bottom].

The question for the Court is, Whether, upon these facts,

Grimley was legally restrained of his civil liberty and held for military service and for imprisonment by the military authorities.

ARGUMENT AND AUTHORITIES.*

The petitioner [appellee] is entitled to be discharged, for the following reasons: —

I. His alleged enlistment was void on the grounds —

1. That he was above the maximum age established by law for recruits.
2. That, independently of his age, the steps for valid enlistment had not been completed.

His arrest and detention by the military authorities was, therefore, illegal, as he had not legally become a soldier, and consequently could not be a deserter.

II. The judgment and sentence of the court-martial — being therefore void for want of jurisdiction in that tribunal over the person of the appellee — can be reviewed collaterally upon habeas corpus, and are no bar to this petition.

I.

Grimley's alleged enlistment on Feb. 18, 1888, was void.

1. He was, at the time, over forty years of age, and therefore above the maximum age for enlistment.

U. S. Rev. St., sect. 1116, provides that "recruits enlisting in the army must be effective and able-bodied men between the age of sixteen and thirty-five years at the time of their enlistment. This limitation as to age shall not apply to soldiers reënlisting." Any enlistment under sixteen or over thirty-five is prohibited by law, and is, therefore, of no effect, and void.

* See also brief in "Morrissey" case.

The courts have expressly declared this as to recruits under the minimum age.

Seavey *v.* Seymour, 3 Cliff., 439, 445, 447.
In re McDonald, 1 Lowell, 100.
In re Davidson, 21 Fed. Rep., 618:
In re Hearn, 32 Fed. Rep., 141.
In re Lawler, 40 Fed. Rep., 233, 235.

Thus, in Davidson's case, *ubi supra*, Wallace, J., said (p. 622): "The reasonable conclusion warranted by these sections [1116 *et seq.*] would seem to be that the contract of enlistment of a minor under sixteen years of age is void."

In Hearn's case, *ubi supra*, Welker, J., says (p. 142): "It is clear that Congress provided by these sections that a minor under sixteen years of age cannot be enlisted, and, if done, it would be absolutely void, and he could not be held to service."

In Lawler's case, *ubi supra*, Pardee, J., says: "If he was under sixteen years of age the enlistment was void, whether the father consented in writing or not."

In Beswick's case (25 How. Pract., 147, 152-3), Bacon, J., says: "It being now established that Beswick was only fifteen years of age when he enlisted, . . . from what has been said the conclusion results that his enlistment was invalid, and might at any moment have been terminated by an application for that purpose." [He was remanded on the ground that he had been more than a year in receipt of pay, and in actual service, and deserted in Virginia, in 1862, in the presence of the enemy, after he was sixteen.]

In McDonald's case, *ubi supra*, it was held that an enlistment under eighteen (which was then the statutory minimum) was void.

The very point at issue was decided in construing a similar act of the Confederate Congress fixing a maximum age for soldiers.

Goodson *v.* Caldwell, 2 Winston (N.C.), 135.

No question arises in this case as to whether the contract is only "voidable," as distinguished from "void," — such as arises in the case of minors enlisting between sixteen and twenty-one. [See Chapman's and Cosenow's cases, 37 Federal Reporter, 327, 668, and cases there cited.] The illegality here relied on is created wholly by express prohibitory statute, and is not complicated by questions of construction as to the effect of a statute upon a partial common-law disability preëxisting.

The reasons for holding void an enlistment, like the present, above the maximum age are even stronger than in the case of one below the minimum; for the latter is a defect which time would speedily remedy, while time would only aggravate the former by rendering the recruit constantly less "effective" and less "able-bodied." The reason and importance of the rule as to the maximum age are emphasized by the exception in sect. 1116, that "this limitation as to the age shall not apply to soldiers reënlisting,"— thus negatively, as well as affirmatively, forbidding the enlistment of new men over thirty-five; and also by the fact that while the minimum age has been reduced to sixteen, even in time of peace, and the minimum height of five feet six inches is abolished (St. 1838, ch. 162, sect. 30), the maximum age has never been raised above thirty-five, except temporarily in the War of 1812, when it was raised first to forty-five, and then to fifty, and was promptly restored in 1815 to thirty-five years, where it has remained since.

St. 1802, ch. 9, sect. 11 (2 St. L., 134).
St. 1812, ch. 14, sect. 11 (1 St. L., 672).
St. 1813, ch. 12, sect. 5 (2 St. L., 792).
St. 1814, ch. 10, sect. 3 (3 St. L., 146).
St. 1815, ch. 79, sect. 7 (3 St. L., 225).

It is true that Mr. Justice Blatchford says in Ferren's case (3 Benedict, 442, 448), that he was not aware that the Act of

1814 had been repealed; but it seems to be well settled that the Act of 1815 repealed it. (See Shaw, C. J., in Kimball's case, 9 Law Reporter, 500-502-3; Gray, J., in Tyler *v.* Bomeroy, 8 Allen, 480, 492-3; Lowell, J., in McDonald's case, 1 Lowell, 109, 102-3; Clifford, J., in Seavey *v.* Seymour, 3 Cliff., 439, 449; Fox, J., in Andrew's case, 1 Hask., 87). And such was evidently the opinion of Congress when it made the maximum thirty-five, in the revision of 1874. Winthrop's Military Law, 766, note 2. The Act of 1815, sect. 7, restores the provisions of the Act of 1802, as to the recruiting, "and with the same *limitations*," thus in terms restoring the limitations of age established by the Act of 1802, which made thirty-five the maximum.

The decision in Ferren's case (3 Benedict, 442) is only that an executive regulation prohibiting the enlistment, without special authority from the adjutant-general, of a man having a wife, does not have the effect of establishing a legal disqualification for enlistment, since the statutes prescribe distinctly the necessary qualifications, and do not exclude married men. The only statutory disqualification alleged in the case was drunkenness, and that was disproved in fact (p. 450).

The cases of U. S. *v.* Wyngall, 5 Hill, 16, and U. S. *v.* Cottingham, 1 Robinson [Va.], 615, hold merely that the enlistment of aliens is not rendered void by the recital, "citizen of the United States," in St. 1802, ch. 9, sect. 11, those words being directory. They have since been dropped out of the statute. Tilghman, C.J., indeed, says, *obiter*, in Commonwealth *v.* Barker (5 Binney, 423, 426), while the War of 1812 was still in progress, that the Act of 1802, as amended by the Act of 1812, does not restrict enlistments to persons between eighteen and forty-five, but was only a regulation of the compensation of recruiting-officers. We submit that this is not sound, for if it had been intended to allow enlistments under eighteen or above forty-five, it was proper to pay the recruiting-officers

for them and Congress would have so provided. But however the original act may be in this respect, the present law [sect. 1116] is distinctly and unequivocally mandatory as to the conditions precedent for enlistment (quite irrespective of the compensation of recruiting-officers, which is not even mentioned), and cannot by any stretch be treated as merely directory. The retention of the age limitation, while "citizenship" is dropped out, emphasizes its mandatory character.

Sedgwick on Statutes, 325.

A maximum limitation fixed by the Confederate Congress was held mandatory, and the recruit discharged, even in December, 1864, when the Confederate cause was in its most desperate straits, and needed every soldier it could get.

Goodson *v.* Caldwell, *ubi supra*.

The decision in Commonwealth *v.* Gamble (11 S. and R., 92) stands on the independent ground that the prisoner had legally enlisted in the "marine corps," which was a part of the navy, in which the law allowed the enlistment of minors. The rest is, therefore, *obiter dictum*.

Even if we treat the enlistment as only "voidable," Grimley's act in leaving the rendezvous within fifteen minutes and not returning, and sending word within forty-eight hours, on the next week-day in the morning, that he was not going to enlist, was an adequate and seasonable avoidance, and is confirmed by his petitioning for habeas corpus. He had not been assigned to, or entered upon, any duty, had not donned a uniform, and had promptly repudiated or disaffirmed his contract.

In U. S. *v.* Hanchett (18 Fed. Rep., 26) it was held that the enlistment could be avoided after being three days at the rendezvous.

In Beswick's case (25 Howard's Practice Reports, 149)

the minor delayed a year, and in Ferren's case (3 Benedict, 442), twenty days, in putting an end to his contract. In Wall's case (8 Fed. Rep.) it does not appear that the recruit was below the minimum age, and he had been in actual service two years, and was on actual duty in the night at the time of desertion.

The declaration of the petitioner at the rendezvous as to his age is not conclusive as against the actual fact, and is immaterial if he is not in fact within the statutory age. He cannot by any declarations of his own make himself a soldier if the law says he cannot be one.

In re McDonald, 1 Lowell, 100.
Seavey *v.* Seymour, 3 Cliff., 439, 447.

Whatever may be the effect of a false oath [*e.g.*, by a minor that he is 21] when the recruit is in fact within the lawful ages, *i.e.*, is between 16 and 35 (see Chapman's and Cosenow's cases, 37 Fed. Rep., and cases cited), it cannot make valid an enlistment outside of those limits. An oath as to age is not, and never has been, made by statute conclusive that a man is within the maximum.

The oath prescribed by statute [R. S., sect. 1342, art. 2] contains nothing as to age, and the reference to twenty-eight years [p. 20, Exhibit B, bottom] is a mere incidental recital preceding the "acknowledgment" which precedes the oath, and is no part of the latter. Captain Miller's recital of the same age [Exhibit C, p. 22, top] adds nothing to the other. The statement that he was "of the legal age to enlist" [Declaration of recruit, p. 21] is not under oath, and is at the best ambiguous. It might mean that he was above the minimum age [16], or above 21, in either of which senses it was true.

It was provided at one time [St. 1862, ch. 25, sect. 2] that a minor's oath that he was of age should be conclusive; but even that was held not binding on the minor himself

[Commonwealth *v.* Blake, 8 Philadelphia, 523, 527–8], and is repealed by Rev. St., sect. 5596. (See Winthrop's Military Law, 778.)

The recital that he was twenty-eight years old, even if material, would be entitled to little weight under the circumstances, the whole proceedings at the rendezvous being brief and perfunctory, and the papers being filled out by the officer, and imperfectly apprehended by Grimley. Persons of his station and wandering mode of life are notoriously careless or ignorant as to their age. It is probable, as the legal maximum age does not appear to have been explained to him, that he merely supposed that, in order to enlist, he must be over twenty-one, and stated his age sufficiently only for that purpose. It is a familiar characteristic of such persons — if they know their own age at all with any accuracy — to understate it. Even if we assume that he deliberately falsified with the purpose of getting into the military service in spite of the statutory maximum, it would at most show a strong desire to enlist, and such a desire, however strong, cannot make a soldier out of a man whose enlistment the statute prohibits. The military authorities cannot waive the statutory maximum established by Congress, either on account of the recruit's perjury as to his age or for any other reason whatever.

The legislative department, or officers expressly thereunto authorized by statute, can alone do that (Winthrop's Military Law, 769, 770). The remark of the Court in U. S. *v.* Wyngall, *ubi supra*, that an illegality can be waived by the Government is *obiter dictum*, the enlistment in that case being held not to be illegal.

Even if the Government officers can waive the maximum of age, they had already waived the enlistment itself quite as effectually by telling his mother that he need not return, and might go to work. If the officers could do the one, they could do the other, and the inchoate enlistment was waived first.

2. Independently of Grimley's age, the proceedings at the rendezvous did not constitute a valid enlistment so completed as to exchange his civil status for the military status.

United States *v.* Thompson, 2 Sprague, 103; s. c. 27 Law Reporter, 23.

Tyler *v.* Pomeroy, 8 Allen, 485–6.

Bamfield *v.* Abbott, 9 Law Reporter, 510.

He was entitled to be allowed time to consider the subject until his mind was fully made up before the oath was administered to him (Army Regulations of 1881, reg. 766), and his mind could not be intelligently made up within the meaning of the law (Rev. St., sect. 1342, art. 2) until all the Articles of War had been read to him, so that he could know just what his new status was. Several days out of the atmosphere of the rendezvous are deemed a reasonable time to think it over (reg. 767). The oath administered to Grimley was, therefore, ineffectual in law to make him a soldier (sect. 1342, art. 2). It does not appear that articles 47 or 103, or any of the other articles of war, were intelligibly explained, or even read to him at all (Miller, p. 9, top; Conahan, p. 11, bottom; John Grimley, p. 16, bottom); and it is evident that the nature of the oath, or even of oaths in general, was not explained to him (John Grimley, pp. 14, bottom; 15, bottom; 16, top and bottom; 17, top; 18, top, and *passim*) during the fifteen minutes or so that he was at the rendezvous in all.

The weight of the little which Miller testifies about his explanation to Grimley, and which is contradicted by the latter, is impeached by the fact that the court-martial finds one important statement by Miller (in reference to Grimley's donning a uniform) either wilfully false or inaccurate in recollection (p. 18, middle).

Under such circumstances Grimley evidently still had in law a *locus penitentiæ* open to him. In U. S. *v.* Thompson,

ubi supra, Lovett, a naval recruit, had taken all the steps at the rendezvous, including the oath, and had gone to the receiving-ship, which corresponds to the recruiting "depot" in the army (Conahan, p. 10, near bottom), but was held not yet a sailor. At the depot, the recruit is inspected by the superintendent (reg. 821); may still be rejected (reg. 824); has all the Articles of War read to him (766), until which time the oath cannot be legally administered to him (Rev. St., sect. 1342, art. 2); is furnished with equipments (reg. 777); is again critically examined (reg. 822); and is then assigned to a regiment (reg. 820, 821, 825).

The mere administration of the oath, even if in compliance with the law, does not make the man a soldier.

Seavey *v.* Seymour, 3 Cliff., 439.

Regulations not inconsistent with the statutes have, as against the Government, the full force of law.

Gratiot *v* U. S., 4 How., 80, 117, 118.
Ex parte Reed, 100 U. S., 13, 22.

Regulations cannot have the effect of modifying an explicit statute and introducing something new into it (Ferren's case, 3 Benedict, 442), but where, as in the present case, they are supplementary of a statute which is, when taken by itself, indefinite as to when an enlistment becomes legally complete, they have the force of law in interpreting the statute.

It is clear from the numerous and minute provisions of the statutes, the Articles of War, and the Army Regulations, that both the government and the recruit — the parties to the creation of the new status — are to enter upon it only with the greatest deliberation and circumspection, and possess strong mutual safeguards for the protection on the one hand of the public service, on the other hand of personal civil liberty. The law evidently does not contemplate that a nation of 60,000,000 inhabitants, with an army to raise of

only 25,000 men, shall press unwilling men into the military service, and subject free citizens to the military law and trial by court-martial upon a mere quarter of an hour of perfunctory forms in a recruiting rendezvous. On the contrary, it allows the intending recruit "time to consider the subject, until his mind was fully made up" (reg. 766). Certainly, from Saturday afternoon till Monday morning (Margaret Grimley, p. 13, bottom) was a most moderate and reasonable time for consideration of such an important act in his life. Reg. 908 (as amended Oct. 1887) gives 6 days.

A mere glance at the full report of the trial by court-martial in this case (pp. 6–19), the absence therein of the safeguards which the law throws around the citizen's liberty from his birth till his death, — such as due warrant for arrest, indictment by grand jury, trial by a jury of his peers, the aid of counsel, the right of challenge, the rules of evidence, and the other familiar features of the criminal law, — is enough to show vividly the gravity of the step which a man takes when he surrenders the civil and enters the military status, and the opportunity for deliberate consideration which the law ought to allow him before he is held to have irrevocably taken that step.

II.

Grimley's original arrest and detention by the military authorities being, for the foregoing reasons, illegal, the judgment of the court-martial cannot legalize them, is itself void for want of jurisdiction, and is not a bar to the petition for habeas corpus.

A court-martial has jurisdiction only over soldiers mustered and in pay of the United States, not over civilians.

U. S. Rev. St., 1342, art. 64, [redacted] 71–121.

The judgment of any tribunal against a person, or for an offence, or imposing a sentence, not within its jurisdiction,

is wholly void, and, if it restrains personal liberty, may be reviewed and relieved against collaterally by the appropriate tribunal.

Ex parte Lange, 18 Wallace, 163, 166.
Ex parte Siebold, 100 U. S., 371.
Ex parte Reed, 100 U. S., 13, 23.
Ex parte Fisk, 113 U. S., 713, 726.
Ex parte Neilson, 131 U. S., 176.
Ex parte Parks, 93 U. S., 18, 21.
Ex parte Yerger, 8 Wall., 85, 99, *et seq.*
Ex parte Yarborough, 110 U. S., 651, 653.
Wales *v.* Whitney, 114 U. S., 564, 570.
In re Coy, 127 U. S., 731, 758.

The appropriate tribunal in a case like the present is the District, or Circuit, Court of the United States.

U. S. Rev. St., sect. 751.
Tarble's case, 13 Wall., 397.

In Barrett *v.* Hopkins, 2 McCrary, 129, McCrary, J., says: "I take it to be very clear that the question of jurisdiction of a general court-martial may always, upon the application of any party aggrieved by its judgment, be inquired into by the civil courts. Courts martial are special tribunals with jurisdiction limited to a particular class of cases. If the court exceeds its authority, and undertakes to try and punish *a person not within its jurisdiction*, or to punish a person within its jurisdiction for an offence not within its jurisdiction, its judgment is void, and may be so declared by any court having jurisdiction of the proper parties and of the subject-matter."

The delegation to the Secretary of War of power to discharge any person illegally enlisted by the Act of 1864, did

not divest the Federal courts of their jurisdiction on habeas corpus. It was a cumulative remedy, not an exclusive one.

Commonwealth *v.* Blake, 8 Phila., 523, 525.
Seavey *v.* Seymour, 3 Cliff., 439.
In re McDonald, 1 Lowell, 100, 105.
Ex parte Hanchette, 18 Fed. Rep., 26, 28.

Moreover, the appeal to the Secretary enacted by St. 1864, ch. 13, sect. 20, is repealed. (Rev. St., sect. 55–96. Winthrop's Military Law, 778.)

A court-martial is an inferior court of limited jurisdiction. If Grimley was not, on February 18, 1888, a soldier, the court-martial had no jurisdiction over him for any offence; its sentence against him for desertion is void, as, not being a soldier, he could not be a deserter; and he is entitled to his discharge on habeas corpus both from imprisonment by the military authorities on such sentence and from detention by them for military service.

Wise *v.* Withers, 3 Cranch, 330, 337.
Dynes *v.* Hoover, 20 How., 65, 81.
Ex parte Watkins, 3 Peters, 205.
Ex parte Schmeid, 1 Dillon, 587.
Barrett *v.* Hopkins, 2 McCrary, 129, 131–2.
U. S. *v.* Hanchette, 18 Fed. Rep., 26, 28.
Chapman's case, 37 Fed. Rep., 327.
Cosenow's case, 37 Fed. Rep., 668.

In Wise *v.* Withers (3 Cranch, 330, 337), Chief Justice Marshall says: "It follows from this opinion that a court-martial has no jurisdiction over a justice of the peace as a militiaman; he could never be legally enrolled; *and it is a principle that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it.*"

In Dynes *v.* Hoover (20 How., 65, 82), Mr. Justice Wayne says: "But we repeat, if a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress."

In *Ex parte* Watkins (3 Peters, 193, 209), Chief Justice Marshall says: "This decision (Wise *v.* Withers, 3 Cranch, 331) proves only that a court-martial was considered as one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record. The declaration that this judgment against a person to whom the jurisdiction of the court could not extend is a nullity, is no authority for inquiring into the judgments of a court of general criminal jurisdiction and regarding them as nullities if in our opinion the court has misconstrued the law, and has pronounced an offence to be punishable criminally, which, as we think, is not so."

In *Ex parte* Schmeid, *ubi supra*, Dillon, J., says: "The validity of the enlistment of a person into the military service of the United States may be inquired into on habeas corpus by a United States judge;" thereby practically overruling his own former decisions as a State judge at chambers in Anderson's case, 16 Iowa, 595, that the question was exclusively for a court-martial.

"The power of the Federal courts to discharge soldiers who have been enlisted in violation of this section is now so well settled that a citation of authorities is unnecessary." Brown, J., in Cosenow's case, 37 Fed. Rep. (668, 669), — a case in which a court-martial had already sentenced.

In *Ex parte* Hanchette (18 Fed. Rep., 26, 28), Blodget, J., says: "The most that can be said is, that if the proper offi-

cers see fit to prefer charges against him for desertion he may be tried; but this, I am of opinion, *does not divest this court of jurisdiction to discharge him on habeas corpus if he was not legally enlisted.*"

Where the Court has declined to issue habeas corpus it has been on the ground that it was sought to make the writ of habeas corpus serve as a writ of error to review the findings of other tribunals within their proper jurisdiction.

Thus in *Ex parte* Kearney (7 Wheaton, 38) the Court declined to review on habeas corpus the order of a circuit court committing a witness for contempt, — and in *Ex parte* Watkins (3 Peters, 205), the judgment in a criminal case of a court of general criminal jurisdiction, — on the ground that in neither case was a question of jurisdiction raised. In Dynes *v.* Hoover (20 Howard, 65), — where the judgment of court-martial that a seaman was guilty of attempting to desert was held final in a civil suit brought by him for false imprisonment, — it was admitted that the man was legally a seaman, and as the jurisdiction of the court-martial was thereby established, its findings could not be reviewed on habeas corpus.

The Government's case must obviously stand or fall on the facts as they existed on February 18, 1888, and cannot be aided by anything done between them and the date of this petition. If, as it is distinctly held, the civil courts may on habeas corpus inquire into the validity of a man's enlistment, and discharge him from the custody and control of the military authorities, it is evident that this power resides in the civil courts, to be exercised as well after as before his trial by court-martial for an alleged military offence. The judgment of the court-martial in no way changes the situation. It relates back to and depends upon the original enlistment for its effect, and is wholly nugatory and void if that enlistment was not valid.

If it be sought to rest the proposition that the judgment

of the court-martial cannot be reviewed, on the fact that in this case that judgment had already been pronounced, *i. e.*, upon mere priority of time, the question degenerates into a mere race of diligence between the military and the civil tribunals, in which the former must necessarily always win.

The single question is whether Grimley had become a soldier on Feb. 18, 1888. If he had, the Government would have a good case without, and independently of, actual trial and sentence by court-martial, and could hold him; if he had not, the trial and sentence are void, and cannot give the Government any right to hold him. The civil courts had up to and on February 18 sole jurisdiction of Grimley's person as a civilian, and that jurisdiction is not divested until those courts are satisfied that his person passed from the civil to the military status and jurisdiction. Upon the question whether it had so passed they can inform themselves by any competent evidence presented to them as to the steps taken, acts done, age, etc., and they are necessarily the sole and supreme judges of this "jurisdictional fact."

The decision in Barrett *v.* Hopkins (2 McCrary, 129) goes even farther in this direction than we require; for it holds that the civil courts may inquire into the continuance of a court-martial's jurisdiction in a case where confessedly that court had in the first instance jurisdiction of both person and offence; while in our case the civil court is only asked to inquire whether the court-martial ever had obtained jurisdiction at all; *i.e.*, had ever divested the civil courts of their original sole jurisdiction of the person.

Any other doctrine than the one here contended for would permit the military authorities to arrest any civilian on the street, throw him into a military dungeon, hurry him to trial and sentence before a military tribunal, and imprison him upon such sentence — all of which was done in Grimley's case — without any remedy whatever in the civil courts, unless their machinery could be set in motion before the

court-martial convened. It is obvious that this would be in effect the establishment of martial law, the suspension of the habeas corpus and the abandonment of all the guarantees of civil personal freedom. It would, in a word, destroy civil liberty, and overthrow the supremacy of the civil courts and the reign of law, and substitute therefor military despotism and drum-head tribunals administering military law with military procedure.

The line of reasoning which argues that (1) all tribunals are judges of their own jurisdiction; (2) courts-martial have exclusive jurisdiction of the military offence of desertion; therefore (3) the judgment and sentence of a court-martial that a man was a soldier and deserter are final even if the actual facts before this court show that the man was not in law a soldier, is unsound. It proceeds in a vicious circle, for its major premise assumes the conclusion, viz., that the judgment of a court-martial in any matter of jurisdiction on which it assumes to pass is final. It, therefore, begs the question. Its major premise is also clearly unsound in law; for tribunals of special and limited jurisdiction like courts-martial are not the final judges of their own jurisdiction (subject only to review by an appellate authority); but, on the contrary, are — upon the question of jurisdiction — subject to review collaterally upon habeas corpus in the general civil courts. [See Marshall, C.J., in *Ex parte* Watkins, *ubi supra*.] The established civil courts of general criminal jurisdiction are final judges of their own jurisdiction (subject only to review on writ of error or appeal by an appellate tribunal), and their jurisdiction over the personal liberty of the citizen from the day of his birth is antecedent and paramount, and is not divested until they are themselves satisfied that he has legally enlisted and become legally subjected to the military jurisdiction.

In the present case the record of the court-martial, — which is before this court and contains all the evidence introduced

before the court-martial, — itself shows that Grimley had not become a soldier, even without considering the fact of his age. The evidence before that court was insufficient to sustain its finding even without resort to competent evidence *aliunde*, like that as to age.

The question whether a recruit can be held on sentence of court-martial for desertion is precisely the same as the question whether he could be held for military service at all, — as, for instance, on a petition for habeas corpus brought by a recruit without deserting, and consequently without court-martial, simply to dispute the validity of his enlistment, — and depends, equally with the latter, solely on the validity of his enlistment. If the enlistment is valid he can be held both for military service, and to serve out a sentence where one is imposed by court-martial. If it is not valid, he can not be held for either, for to hold that a man who cannot be held to serve out the remainder of his term of enlistment can be imprisoned by court-martial and shall then be set free at the expiration of his term of imprisonment is an absurdity.

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